Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

RICHARD L. CHANDLER, Petitioner
v.
RACHEL CHANDLER, WILLIAM R. COPELAND
WELDON S. COPELAND AND WELDON S. COPELAND,
JR., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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135PP

QUESTIONS PRESENTED FOR REVIEW

Question 1: **If trial court lacked subject matter jurisdiction over petitioner's gross retired pay, does granting respondent Rachel Chandler summary judgment on grounds of res judicata and limitations constitute such violation against petitioner, as a military retiree, so as to violate the due process clause of the Fourteenth Amendment?**

Question 2: **Under 10 U.S.C.A. § 1408(c)(1), did the trial court have authority in divorce action to divide petitioner's total military retired pay?**

Question 3: **Did USAFAC have authority under 10 U.S.C.A. § 1408(d)(1) to make direct payment of $450.00, of petitioner's total retired pay to Rachel?**

Question 4: **Does denying petitioner's motion to recuse Judge Chew, on grounds that it was not timely filed and allowing said judge to participate in the recusal motion constitute such violation of Rule 16, TRAP, so as to violate the due process clause of the Fourteenth Amendment?**

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PETITION FOR WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard L. Chandler, prays that a Writ Certiorari issue to review the judgment of the Court of Appeals, Eighth District of Texas (CA8th), entered on April 15, 1999, in Cause No. 08-97-00484-CV, styled: Richard L. Chandler v. Rachel Chandler, William R. Copeland, Weldon S. Copeland and Weldon S. Copeland, Jr.. On November 12, 1999, the Supreme Court of Texas overruled petitioner's motion for rehearing of the Court's denial of petitioner's petition for review. The CA8th judgment, finally adjudicated the claims petitioner filed in the 41st District Court, El Paso County, Texas (trial court) which, among other claims, asserted: **(1)** the decree of divorce (decree) entered by the trial court on May

28, 1980, is not a "court order" as defined in the Uniformed Services Former Spouses' Protection Act (USFSPA) now 10 U.S.C.A § 1408[1]; **(2)** upon divorce the trial court lacked subject matter jurisdiction to treat petitioner's total retired pay; and, **(3)** under USFSPA the United States Army Finance and Accounting Center (USAFAC) lacks authority to make direct payment of petitioner's total retired pay to Rachel.[2] In his appellate brief and petition for review petitioner again asserted claims **(1)** through **(3)** above as well as claims under the Fourteenth Amendment.[3]

OPINIONS BELOW: The Supreme Court of Texas, denied petitioner's petition for review and subsequently

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[1] The applicable constitutional and statutory provisions are set out verbatim in Appendix F.

[2] The 8th CA opinion shows the basis of petitioner's claims presented in the trial court as follows:

Opinion (Appn. B at 1, 2): "The driving issue, from Richard's perspective, is whether Rachel is entitled to an interest in his military retirement benefits." (App. B at 63): "[Petitioner] sought summary judgment declaring that direct payment of the military retirement benefits by USAFAC to Rachel violates both USFSPA and the terms of the decree of divorce."

[3] That petitioner raised Fourteenth Amendment claim is shown at pages 31-35 of his appellate brief in CA8th and by Issue 3 in his petition for review to the Supreme Court of Texas.

overruled his motion for rehearing on November 12, 1999. The letter notice overruling the motion for rehearing appears at Appendix A. The CA8th, issued the only opinion in this case which is at Appendix B. The opinion is also reported in *Chandler v. Chandler*, 991 S.W.2d 367, 391 (Tex.App.-El Paso 1999). The judgment, permanent injunction and cease and desist order rendered in the trial court are at Appendix C. The CA8th order denying petitioner's motion to recuse Justice David Wellington Chew is at Appendix D and the CA8th's order overruling motion for rehearing is at Appendix E.

JURISDICTION: Jurisdiction to review said judgment is invoked under 28 USC § 1257(a).

QUESTIONS PRESENTED: Final judgment was rendered May 12, 1997.[4] In his motion for summary judgment and his response to Rachel's motions, petitioner asserted USFSPA claims in **(1)** through **(3)** above. The CA8th, concluded "that direct payment to Rachel of her interest in Richard's military retirement benefits, as requested by her and as granted by USAFAC, . . . does not violate USFSPA." and "[w]e find no

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[4] See Appn. C, at 1-6.

abuse of discretion in the trial court's determination that Richard should be enjoined from representing that Rachel is not entitled to her vested property interest in the military retirement benefits." Appn. B at 82, 89. Thus, questions presented are:

Question 1: If trial court lacked subject matter jurisdiction over petitioner's gross retired pay, does granting Rachel summary judgment on grounds of res judicata and limitations constitute such violation against petitioner, as a military retiree, so as to violate the due process clause of the Fourteenth Amendment?

Question 2: Under 10 U.S.C.A. § 1408(c)(1), did the trial court have authority in petitioner's divorce action to treat or divide petitioner's total military retired pay?

Question 3: Did USAFAC have authority under 10 U.S.C.A. § 1408(d)(1) to make direct payment of $450.00, of petitioner's total retired pay to Rachel?

After CA8th rendered its opinion, petitioner filed a motion to recuse a judge of the court hearing the appeal under the provisions of Rule 16, Texas Rules of Appellate Procedure (TRAP) The Rule provides that such motion must be filed promptly after the party has reason to believe the judge should

not participate in the case and once the motion is filed the challenged judge must not sit to consider the motion as to him. On June 9, 1999, the CA8th denied said motion as untimely and allowed challenged judge to participate in the recusal motion. See Appn. D. Thus, the question presented is:

Question 4: Does denying petitioner's motion to recuse Judge David Wellington Chew, on grounds that motion was not timely filed and allowing said judge to participate in the recusal motion, constitute such violation of petitioner's rights so as to violate the due process clause of the Fourteenth Amendment?

FEDERAL PROVISIONS INVOLVED: The case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States and 10 U.S.C.A § 1408.

STATEMENT (Preliminary): Petitioner asks that this Court note that the Supreme Court of Texas heretofore decided the same USFSPA questions presented above, to wit: under USFSPA, does a Texas court have authority to divide total military retired pay on divorce.[5] In his appellate brief, at 27,

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[5] See *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987) and the underlying case, *Grier v. Grier*, 713 S.W.2d 213 (Tex.App. - El Paso 1986). In the

petitioner, citing *Mansell v. Mansell,* 109 S.Ct. 2023, 2028-29 (1989), again asserted that the trial court has no authority to treat $450.00, of his total retired pay and USAFAC has no authority to make direct payment of said retired pay to Rachel. The CA8th's opinion (Appn. B at 71) notes that the Supreme Court of Texas' decision in *Grier* is controlling case law in Texas and it held that a Texas court could divide such retired pay. In this case the CA8th upheld the Supreme Court's

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latter *Grier* case the CA8th answered the question in this case as follows:

"Under the [USFSPA] it is specifically provided that any payment can only be made from the member's **disposable** pay. We conclude that only disposable pay of Appellant is before the Court for division." Emphasis to show that court based its holding on disposable pay.

Thereafter, the Supreme Court of Texas held:

"We conclude that FUSFSPA provisions are intended only as a limit on the amount of disposable retired pay which can be garnished and paid out by the service secretaries pursuant to court orders.

The judgment of the court of appeals is modified to the extent that Elise Grier is awarded 37.45% of Edward Grier's **gross** retired or retainer pay . . . ." Emphasis to show Court determined courts have jurisdiction of gross as well as gross retired pay.

Also see *Cook v. Cameron*, 733 S.W.137, 141(Tex.1987) where the Supreme Court of Texas, in dealing with military retired pay under USFSPA, held: "We render judgment ordering the trial court to enforce the judgment in *Cameron v. Cameron* 641 S.W.2d 210, 213 (Tex. 1982) awarding Cook thirty-five percent of gross retirement benefits beginning June 25, 1981."

decision in *Grier* even though, as noted in footnote 6, it previously held a contrary position and in this case it concluded, that: "In effect the [*Mansell*] overruled *Grier*."[6] (Appn. B at 72).

The Parties: Respondents are: Rachel Chandler, petitioner's purported former spouse; William R. Copeland, attorney for all respondents; and, Weldon S. Copeland and Weldon S. Copeland Jr., Rachel Chandler's former attorneys. Petitioner, Richard L. Chandler, is a retired Army Major receiving monthly retired pay.

Statement Concerning Questions 1, 2 and 3: In 1977, Rachel filed for divorce. On May 28, 1980, a decree was entered ordering petitioner to pay Rachel $450.00, of his total retired each month.[7] In June, 1981, petitioner exercised his

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6 As is noted in footnote 5 above that the CA8th previously ruled in *Grier v. Grier*, 713 S.W.2d 213, 216 "that only the member's disposable retired pay is before the Court for division" which, viewed in light of *Mansell*, simply means the trial court had no jurisdiction over total or gross retired pay only disposable retired pay as that term is defined in 10 U.S.C.A. § 1408(a)(4) and further subject to the limits set out in 10 U.S.C.A. § 1408(d)(1) and 10 U.S.C.A. § 1408(e)(1).

7 See pertinent part of decree in CA8th opinion (Appn. B at 2, 3).

right as a trustee and stopped paying Rachel the $450.00. From June, 1981 to August, 1983, Rachel took no enforcement action in the trial court.[8] In August, 1983, Rachel made application to USAFAC requesting direct payment of the $450.00.[9] After the application was submitted USAFAC notified petitioner in pertinent part as follows:

"The US Army Finance and Accounting Center (USAFAC) has been served a court order dividing your retired pay as property. The US Army is required by this order to withhold $450.00 a month of your disposable retired pay and forward the monies to Rachel P. Chandler."[10] App.Br. 22.

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8 In its opinion, Appn. B at 100, the CA8th cites *Goad v. Goad*, 768 S.W.2d 356 (Tex.App.--Texarkana 1989, writ denied), cert. denied, 493 U.S. 1021, 110 S.Ct. 722, 107 L.Ed.2d 742 (1990) Footnote 5 of *Goad* cites *Ex parte Goad*, 690 S.W.2d 894 (Tex.1985) which shows that *Goad* is not similar to this case in important respects. In *Ex parte Goad* Mrs. Goad filed a contempt action against Mr. Goad and obtained a judgment for arrearages, which Rachel has never done. Rachel simply went outside the judicial system and requested direct payments from USAFAC. Ex parte *Goad* also explains why Rachel did not file a contempt action in this case. Aside from avoiding petitioner's defense that their marriage was void, she avoided a judgment that would have been void because arrearages from June, 1981, when petitioner stopped paying the $450.00, to August, 1983 when she made her application to USAFAC would exceed the amount allowed under the two year limitations specified Section D, §§ 3.70-3.77 Texas Family Code. Id. 896.

9 This Court should note that Rachel's application to USAFAC is the point where she, not petitioner, invoked USFSPA into a purely Texas divorce action that in no way concerned USAFAC or USFSPA.

10 When the portion of the decree noted in footnote 7 is compared to the

After receipt of USAFAC's notice, petitioner requested it to stop making direct payment of the $450.00 because: (1) the decree was not a "court order" under 10 U.S.C.A § 1408(a)(2); (2) the trial court lacked subject matter jurisdiction to treat petitioner's total retired pay; and (3) the decree did not order USAFAC to pay $450.00, to Rachel. On November 16, 1994, petitioner filed a motion for clarifying order, asserting the claims set out above in **(1)** - **(3)** above. Thereafter, Rachel moved for summary judgment on grounds that petitioner's claims were barred by res judicata and limitations and USFSPA was applicable to the decree. Petitioner responded to the motion for summary judgment as follows: [1] his and Rachel's marriage is void; [2] the trial court lacked subject matter jurisdiction over petitioner's total retired pay under 10 U.S.C.A. § 1408(c)(1); [3] USAFAC had no authority to make direct payment of $450.00 of petitioner's total retired pay under 10 U.S.C.A. § 1408(d)(1); and, [4] res judicata would not apply to

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portion of the decree that USAFAC describes in the notice, it is clear that either the USAFAC's statement above is untrue or Rachel returned to the trial court and obtained a modification of the decree. If the latter is true, she obtained a modification of the decree without notice to petitioner, which as shown in footnote 11, citing *Peralta* denies petitioner due process of law and violates the Fourteenth Amendment.

petitioner's USFSPA claims because the trial court lacked subject matter jurisdiction of such claims. On May 12, 1997, the trial court, entered summary judgment, permanent injunction and permanent cease and desist order. For purposes of this petition, petitioner notes that this case proceeded through the Texas courts on the basis of Texas summary judgment law which requires that petitioner's responses to summary judgment, which are set out above, must be taken as true. *Peralta v. Heights Medical Center, Inc.* 108 S.Ct. 896, 899 (1988),[11] and *Chandler v. Chandler*, 991 S.W.2d 367, 391 (Tex.App.-El Paso 1999). Rachel did not deny that under *Mansell* a pre June

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11 *Peralta* is a case that is factually similar to this case in that it is an appeal of a bill of review summary judgment wherein in response to a summary judgment Mr. Peralta denied that he had been personally served and that he had notice of the judgment. On appeal Mr. Peralta repeated his claims that in the absence of valid service of process and notice of the judgment, showing a meritorious defense was not necessary under Texas law and requiring it violated the Fourteenth Amendment. In this case USAFAC in the notice cited above claims to have received a court order requiring it to withhold $450.00, from petitioner's total retired pay and forward it to Rachel. Petitioner has asserted he had no knowledge of such an order. Therefore, he is in the same position as Peralta. Additionally, as noted above petitioner asserted that the trial court lacked subject matter jurisdiction over his total retired pay, therefore the decree as to division of retired pay is void. Like Peralta, this case proceeded through Texas courts on that basis and must be taken as true. Like Peralta, petitioner asserts that requiring him to show that a void decree and a bill of review judgment growing out of such decree is not res judicata to his claims in this case violates the due process clause of the Fourteenth Amendment.

26, 1981 decree, such as the one in this case which treats total retired pay, is void as to such retired pay, because the trial court lacked subject matter jurisdiction over such retired pay.

In this case the CA8th held that *Mansell* in effect overruled the Supreme Court of Texas' decision in *Grier* on the same issue now before this Court, to wit: do state courts have jurisdiction to treat total retired pay. Appn. B at 71, 72. Also see footnotes 5, 6. Accordingly, *Mansell* not only overrules *Grier*, it also establishes that the trial court in this case lacks subject matter jurisdiction to treat petitioner's total retired pay.[12]

At this point, petitioner respectfully asks this Court to closely review the opinion, Appn. B at 68, which presents an extraordinary reason for allowing Rachel to use extra judicial procedures to authorize USAFAC to make direct payment of the $450.00, to her. Incredibly the CA8th, after citing the provision in the decree shown at 68, holds that said provision "assured each party that s/he would have all enforcement mechanisms available to accomplish the division of property.

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[12] Petitioner believes that *Mansell* extends to, and overrules, Cook v. Cameron, 733 S.W.2d 137 (Tex.1987).

Richard admittedly stopped payment of Rachel's interest in the retirement benefits, leaving her in a position to obtain enforcement through any means available." The phrase "any means available" can only be a reference to the statement in the opinion, Appn. B at 3, "In 1983, Rachel through her attorneys, successfully applied to ... (USAFAC) for direct payment of the benefits awarded to her." Petitioner is amazed that one of the highest courts in Texas would use such broad language as "any means available", which includes illegal means and means outside the judicial system. The CA8th suggests that in Texas it is proper for a former spouse to obtain direct payment of a retirees retirement pay by retaining attorneys to submit an application to USAFAC requesting direct payment. Petitioner concedes that the cited provision allows either party to require the other to execute "all instruments necessary to effect this decree", which is precisely what petitioner attempted to do in this case, as is shown in the opinion, Appn. B at 8, which states: "[... petitioner filed a motion for clarifying order, **seeking an order requiring Rachel to revoke her application for direct payment of the military retirement benefits**." Emphasis to show that petitioner attempted to enforce the decree, through

the trial court, under the cited provision. In a case that is similar to this case, *Patrick v. Patrick*, 728 S.W.2d 864 (Tex.App.-Fort Worth 1987), the former spouse used essentially the same provision in her decree, as cited by the CA8th at 67, to obtain a money judgment for arrearages; an order of contempt; and, compel the former husband to execute a document authorizing the Air Force to pay one-half of his benefits to her. Id at 866. Obviously, Rachel could have followed the exact procedure followed by the Mrs. Patrick, but she chose not to do so. Rather, "Rachel, through her attorneys, [went outside the judicial system and] applied to [USAFAC] for direct payment of the benefits awarded to her." Appn. B at 3. Apparently the CA8th approves of Rachel and her attorneys' extra judicial procedures, "as any means available" because its opinion states: "Accordingly, we conclude that direct payment to Rachel of her interest in Richard's military retirement benefits, as requested by her and as granted by USAFAC, is not an unauthorized modification of the decree and does not violate USFSPA." Appn. B at 82.

Petitioner would briefly comment about the CA8th,s analysis of 32 C.F.R. 63.6(c)(7) at Appn. B at 75, 76. The first

sentence of the regulation reads in part: "***Court orders*** awarding a division of retired pay as property that were issued before June 26, 1981, shall be honored . . ." Emphasis added. Clearly this regulation refers to court orders and as noted above, the decree in this case is not a court order. See appn. F at 1, 2. To be a "court order" the decree in this case must specifically provide for payment of an amount of disposable retired pay from petitioner's disposable retired pay. The mandatory language is not in the decree; therefore, it is not a "court order" and the regulation cited by the CA8th is not applicable.

In the trial court and throughout the appellate process, petitioner asserted: (1) before the doctrine of res judicata would apply in this case, the trial court rendering the decree and bill of review judgment must have jurisdiction over petitioner's total retired pay under USFSPA; and, (2) so much of the decree, dealing with petitioner's total retired pay, is void because the trial court lacked subject matter jurisdiction over such pay. Petitioner asserted that it was Rachel's application to USAFAC, requesting direct payment of $450.00 of petitioner's total retired pay, that brought USFSPA into this case.

Res judicata: Under Texas law a court may apply res judicata to bar relitigation of claims presented to a Texas court upon finding: (1) that the prior judgment was rendered by a court of competent jurisdiction; (2) that there was a final judgment on the merits; (3) that the parties, or those in privity with them, are identical in both suits; and (4) that the same cause of action is involved in both suits. *Matter of Camp*, 59 F.3d 458, 550 (5th Cir. 1995). Citations omitted. However, if the court rendering the prior judgment, here the decree and bill of review judgment, lacked subject matter jurisdiction, the judgment is void and has no res judicata. *Sanders v. Brady (In re Brady, Tex., Mun. Gas Corp.)* 936 F.2d 212, 218 (5th Cir.) (Cert. denied, 502 U.S. 1013, 112 S.Ct. 657, 116 L.Ed. 2d 748 (1991); *Poynor v. Bowie Indep. Sch. Dist.*, 627 S.W.2d 517, 519 (Tex. App.-Fort Worth 1982, writ dism'd); *Dews v. Floyd*, 413 S.W.2d 800, 805 (Tex.Civ.App.-Tyler 1967, no writ).

Under Texas law, courts have no jurisdiction where they lack, among others, subject matter jurisdiction. And, when a judgment is a nullity, it can have no binding force or effect, either in the court rendering it, or in any other court in which it may be brought in question. Id. *Matter of Camp* at 551,

citations omitted. In this case, as in the *Matter of Camp* the trial court, as a court of general jurisdiction, had subject matter jurisdiction, in a general sense, over petitioner and Rachel's divorce, the subsequent bill of review, the motion to clarify, and, injunctive action under the Texas Constitution art. 5, § 8.[13] As above noted, petitioner concedes that the trial court had general jurisdiction over the named actions. However, like the *Matter of Camp*, an action arose post judgment that changed the character of the subject matter jurisdiction required by the trial court to render valid orders or judgments. In *Matter of Camp* the issue that arose limiting the *Camp* court's jurisdiction was homestead. In this case the issue that arose was division of petitioner's total military retired pay under USFSPA and it arose August, 1983, **when Rachel served her application on USAFAC requesting direct payment of $450.00, of petitioner's total military retired pay.** Emphasis to show that it was Rachel's action that invoked USFSPA into

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[13] This case and the *Matter of Camp* are factually the same as concerns characterization of the trial courts' subject matter jurisdiction from the out set of the case, through adjudication of the issues; to judgment; and to post judgment enforcement remedies orders and judgment which are void because the trial courts lack subject matter jurisdiction to impose a certain remedy.

this case. Once USFSPA was invoked into this case by Rachel, all actions concerning petitioner's retired pay, were, and are now governed by 10 U.S.C.A.§ 1408(c)(1), in the same manner as the trial court's jurisdiction in the *Matter of Camp* was governed by the Texas homestead laws. Following the same rational as used in the *Matter of Camp* at 551, even if the trial court had general jurisdiction to act in the divorce and bill of review action, the summary judgment, permanent injunction and permanent order to cease and desist rendered in this case are void because all these actions order remedies, concerning petitioner's total military retired pay, which are not within the trial court's jurisdiction under 10 U.S.C.A.§ 1408(c)(1). In dealing with the subject of petitioner's total military retired pay, under USFSPA, the trial court is not acting under general powers, but it is acting within a specially limited field of jurisdiction declared under Federal preemption powers, and defined in USFSPA (10 U.S.C.A.§ 1408(c)(1)). Consequently, as in *Matter of Camp* at 552, the above judgment, injunction and desist order constitute remedies under USFSPA concerning petitioner's total military retired pay. Therefore, under this Court's precedent in *Mansell* at 2029, the judgment and orders

in this case are void because the trial court has no subject matter jurisdiction over petitioner's total retired pay.

Void Decree and Bill of Review Judgment: Under Texas law a judgment is void when it is apparent that the court rendering the judgment had no jurisdiction over the subject matter. *Masonite Corp. v. Garcia*, 951 S.W.2d 812 (Tex.App.-San Antonio 1997). Under *Mansell* it is clear that Congress enacted USFSPA and specifically legislated laws that preempted state community property laws. Id. 109 S.Ct. 2028. Specifically, 10 U.S.C.A. § 1408(c)(1) preempts the Texas marital property system law which grants jurisdiction to Texas courts to divide total military retired pay upon divorce. Under Texas law a judgment is void when it is apparent that the court rendering the judgment had no jurisdiction over the subject matter.

Under § 1408(c)(1) courts only have subject matter jurisdiction over disposable military retired pay. *Mansell* at 2029. Under federal law a federal court, applying Texas law, may entertain a collateral attack and void a state court judgment if the face of the judgment shows the state court lacked jurisdiction over the subject matter. *Steph v. Scott*, 840 F.2d 267, 270 (5th Cir. 1988). Review of the provision, from the

face of the decree, cited in the CA8th opinion, Appn. B at 2, 3, in light of 10 U.S.C.A. § 1408(c)(1), shows that so much of the decree dealing with petitioner's retired pay is void. According, this Court may, and petitioner asks this Court to void so much of such decree concerning petitioner's total retired pay

Also, petitioner asks the Court to note that the CA8th, used authority under *Grier*, 731 S.W.2d 931, to enforce the Texas marital property system laws over the cited provision of the decree in violation of the Fourteenth Amendment which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." Viewing the decree under USFSPA it is clear that Texas marital property system, expressed in *Grier* and by the CA8th here, abridges petitioner's exemption granted by 10 U.S.C.A. § 1408(c)(1), not to have his total retired pay divided upon divorce. Viewing the judgment on appeal in this case, Appn. C at 1-6, the CA8th has used Tex.R.Civ.P.329b(f) and bill of review procedures mandated in *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979), and Tex.Civ.Prac.&Rem.Code Ann. §§ 16.003-004 (Vernon Supp.

1999), Appn. B at 53 - 63, to abridge petitioner's liberty interests to pursue his rights under 10 U.S.C.A. § 1408(c)(1), in any appropriate state or federal forum, which violates petitioner's due process rights under the Fourteenth Amendment. Petitioner notes that the judgment on appeal, Appn. C at 4, specifically provides that petitioner "is further and additionally permanently enjoined from and he is permanently Ordered to cease and desist from representing or contending to any public officials in any form or forum that the Decree of Divorce rendered by this Court on may 28, 1980, in Cause 77-1540 is null or void or invalid or otherwise not a final judgment." Petitioner believes that the above Texas laws have been used to silence a pro se litigant from exposing how Texas denies military retirees who divorce in Texas of their rights under USFSPA. Under the cited judgment petitioner cannot exercise his federal right under 32 C.F.R. 63.6(i) which provides in pertinent part: "A former spouse or member may request that the designated agent reconsider the designated agent's determination in response to service of an application for payments under this part or the member's answer to the designated agent with respect to notice of such service. . . "

Additionally, the judgment precludes petitioner from requesting assistance from his elected member of Congress in obtaining his rights under USFSPA. In effect the judgment not only closes the state and federal courthouse doors to petitioner, it diminishes the value and weight of his vote in that petitioner cannot represent to his elected representatives that so much of the decree is void to determine how he or she would vote, or has voted, on such issue in the legislative process.

The attempt by CA8th to give jurisdiction to the trial court to treat petitioner's total retired pay in contravention of *Mansell* violates the demands of due process. As noted above, applying limitations and the provisions of USFSPA to the decree in this case, wherein the trial court lacked subject matter jurisdiction over such retired pay, violates the due process clause of the Fourteenth Amendment. Likewise, applying res judicata or limitations to orders and judgments arising from the decree violates petitioner's due process rights.

Statement Concerning Question 4: On April 15, 1999, the CA8th rendered its opinion in this case. Thereafter, petitioner filed a motion for rehearing and at the same time filed a motion to recuse Judge David Wellington Chew, one of the

justices participating in such opinion. On June 9, 1999, the CA8th entered its order overruling the motion for rehearing, which is at Appendix D and its order denying the motion to recuse, which is at Appendix E. The motion to recuse said judge was filed pursuant to Rule 16, TRAP,[14] and alleged as follows: (1) after the CA8th rendered its opinion, petitioner reviewed the transcript and statement of facts in the bill of review action, Cause No. 87-5225, and determined that David Wellington Chew was both a witness in the bill of review action and a judge on panel number two of the CA8th; (2) Judge Chew, as a witness in the bill of review, had testified on material facts concerning the marriage of petitioner and Rachel; and, (3) upon discovering such facts petitioner promptly filed his motion to recuse Judge Chew and submitted trial transcripts as evidence of his testifying in the bill of review. On June 9, 1999, the CA8th rendered its order denying the motion to recuse as untimely. Thereafter, petitioner urged the above claims in his petition for review to the Supreme Court of Texas. On November 12, 1999, the Supreme Court of Texas, by letter

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14 The full text of Rule 16, TRAP, is set out verbatim in Appendix F.

notice, overruled petitioner's motion for rehearing of its denial of the petition for review. The CA8th's denial of the motion to recuse as "untimely" violates the due process clause of the Fourteenth Amendment in that Rule 16, TRAP, has no time limit for filing a motion to recuse.[15] The CA8th did not deny that petitioner promptly filed the motion to recuse as soon as he discovered that Judge Chew was the same person that appeared as a witness in the bill of review case, Cause No. 87-5225, and testified therein on material facts. Additionally, Rule 16.2, specifically provides that: "Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges setting en banc. The challenged justice or judge must not sit with the remainder of the court to

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[15] TRAP 16, became effective September 1, 1997, replacing TRAP 15 and 15a, but merging portions of the old rule with the new Rule 16. Provisions of former Rule 15 are contained in the new Rule 16 at 16.3. The former Rule 15 at (a) states: "Within thirty days after the filing of a proceeding in a court of appeals . . . any party may file with the clerk of the court a motion stating grounds why a justice of judge before whom the case is pendingshould not sit in the case . . ." Under the new Rule 16.3, it now states: "A party may file a motion to recuse a justice or judge before whom the case is pending. The motion must be filed promply after the party has reason to believe that the justice or judge should not participate in deciding the case."

consider the motion as to him or her." A review of the orders overruling the motion for rehearing, Appendix D and the denial of motion to recuse, Appendix E, shows that the CA8th completely disregarded the provisions of Rule 16.3(b) as follows: (a) The order overruling the motion for rehearing shows the En Banc composition of the CA8th, which includes Judge Chew which violates Rule 16.3(b) in that Justice (b) The order denying the motion to recuse shows the composition of Panel No. 2, which includes Justice Chew. Under Rule 16.3(b) "[t]he challenged justice or judge ***must not sit with the remainder of the court to consider the motion as to him or her.***" Emphasis added. Essentially, the CA8th completely ignored the provisions of Rule 16, and allowed Justice Chew to participate in deciding his own recusal motion which denies petitioner the due process protections of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

Simply stated this writ should be granted to demonstrate the supremacy of this Court's precedent in *Mansell*. An artfully crafted opinion that fails on the law and the facts, but succeeds in creating confusion through verbosity will not change this

Court's ruling in *Mansell*, which clearly states: ". . . state courts have been granted the authority to treat disposable retired pay as community property; the have not been granted the authority to treat total retired pay as community property."

So far as petitioner can ascertain, Texas is the only state in the United States which gives its courts jurisdiction to divide a military retiree's total military retired pay upon divorce in contravention of 10 U.S.C.A. § 1408(c)(1) and *Mansell*. Such practice should not prevail because it encourages persons contemplating divorce to forum shop when military retirement pay is involved. Only retired members of the military who divorce in Texas fall under the *Grier* decision and stand to be deprived of a substantial part of their total retired pay under *Grier*. For example, *Grier* 713 S.W.2d at 215, shows Major Grier's total retired pay at the time of divorce was $788.25 a month. Petitioner, Major Chandler's, total retired pay was agreed, between the parties, to be $820.00, which at the very minimum included Federal, State or local income taxes as provided in 10 U.S.C.A. § 1408(a)(4)(C), Pub.L/ 97-252-Sept. 8, 1982. Assuming 10% Federal withholding taxes on a total pay of $820.00, means petitioner paid $45.00, a month on

Rachel's $450.00, and Rachel received $450.00 tax free because Federal income tax is withheld on the total retired pay before the $450.00 was paid out. Under 10 U.S.C.A. § 1408(a)(4)(C), petitioner's disposable retired pay, considering only deduction of Federal taxes, would yield disposable retired pay of $738.00. Under 10 U.S.C.A. § 1408(e)(1), USAFAC only has authority to make direct payment of 50% of petitioner's $738.00 of disposable retired pay or $369.00, and not $450.00, which it paid to Rachel beginning September, 1983.[16] Clearly, each $450.00 payment made by USAFAC to Rachel deprived petitioner of $45.00, (10% of $450.00) of his separate property in violation of the Fourteenth Amendment. The tendency of Federal law in this Country is equal application to all its citizens regardless of the state of their residence. When USFSPA was enacted 10 U.S.C.A. § 1408(c)(1), became the supreme law of the land and the states,

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16 In *Cook v. Cameron*, 733 S.W.2d 137 (Tex. 1987) it shows that although the decree Cook submitted to the United States Government (here USAFAC) granted Cook forty-five percent of Cameron's gross military retirement the United States Government would only pay Cook thirty-five percent of net disposable military retirement. In this case, that same United States Government, USAFAC, treated petitioner differently, in that it directly paid Rachel $450.00, when such amount exceeded 50% of petitioner's disposable retired pay in violation of 10 U.S.C.A. § 1408(e)(1).

including Texas, could not vest courts with power to violate the law of the land. *Kalb v. Feuerstein*, 60 S.Ct. 343, 346 (1939).

From *Cameron v. Cameron* 641 S.W.2d 210 (Tex.1982), through *Grier, Cook*; to *Buys v. Buys*, 924 S.W.2d 369 (Tex. 1996) the Texas Supreme Court disregards the jurisdictional limit, to disposable retired pay, imposed by 10 U.S.C.A. 1408(c)(1) which is shown in *Buys* at 371, and states:

> "The purpose of this Act [USFSPA] was to reverse *McCarty's* effect and to once again allow state courts to **treat retired pay** of a spouse with military service as marital property state law." Emphasis added.

Citing *Mansell*; *Grier* and *Cameron*,[13] The above statement implies accord with *Mansell*, but review shows that is not the case. The statement in *Mansell*, at 2026, referenced in *Buys* is:

> "In direct response to *McCarty*, Congress enacted the [USFSPA] which authorizes state courts to treat '"disposable retired or retainer pay"' as community property.10 U.S.C.A.1408(c)(1)."

---

[13] At this point this Court is asked to specially notice how the Texas Supreme Court circumvented 10 U.S.C.A. § 1408(c)(1) from *Cameron* to this case. In *Cameron* at 213 it shows that the case involved "thirty-five percent (35%) of the gross present and future Military Retirement presently being received" and that the Texas court invoked § 1408(c)(1) when it affirmed part of the judgment. . . "but only for the period beginning after June 25, 1981" the effective of USFSPA. After invoking USFSPA the Court simply disregarded "disposable retired pay" and allowed division of "gross retired pay" which is now established law in Texas.

The Texas Supreme Court disregards the phrase ""disposable retired or retainer pay"" in the emphasized phrase so it appears that the cited cases had the authority of *Mansell*. However, such authority only extends to cases where courts treat disposable retired pay. The Texas Supreme Court has no authority to edit 10 U.S.C.A. 1408(c)(1) to support its decisions to the detriment of military retirees such as petitioner and retirees in the above cited cases.

CONCLUSION: Petitioner prays a Writ of Certiorari issue to review the judgment of the Court of Appeals, for the Eighth District of Texas in the above named and numbered cause. If this Petition is granted, petitioner prays the judgment of the court below be reversed and the cause be remanded.

Respectfully submitted,

Richard L. Chandler

RICHARD L. CHANDLER
6801 W. 19TH ST. #317
LUBBOCK, TEXAS 79407
(806) 791-4685

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari was mailed to William R. Copeland at 1533 Lee Trevino, Suite 204, El Paso, Texas 79936, on the 15th day of February, 2000.

Richard L. Chandler

Richard L. Chandler

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

RICHARD L. CHANDLER, Petitioner
v.
RACHEL CHANDLER, WILLIAM R. COPELAND
WELDON S. COPELAND AND WELDON S. COPELAND,
JR., Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RICHARD L. CHANDLER
6801 W. 19TH ST. #317
LUBBOCK, TEXAS 79407
(806) 791-4685

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THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

September 23, 1999

Mr. William R. Copeland
Copeland & Copeland
1533 Lee Trevino, Suite 204
El Paso, TX 79936

RE: Case Number 99-0676
Court of Appeals Number: 08-97-00484-CV
Trial Court Number: 77-1540

Style: RICHARD L. CHANDLER
V.
RACHEL CHANDLER, WILLIAM R. COPELAND, WELDON S. COPELAND, and WELDON S. COPELAND, JR.

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review as amended in the above styled case.

Sincerely,
John T. Adams, Clerk

by Tanya R. Hunter, Deputy Clerk

cc:
Ms. Dern'se Pacheco, Clerk Mr.
Mr Edie Rubalcaba
Mr. Richard Chandler

APPENDIX "A" PAGE 1

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 12, 1999

Mr. William R. Copeland
Copeland & Copeland
1533 Lee Trevino, Suite 204
El Paso, TX 79936

RE: Case Number 99-0676
Court of Appeals- Number: 08-97-00484-CV
Trial Court Number: 77-1540

Style: RICHARD L. CHANDLER
V.
RACHEL CHANDLER, WILLIAM R. COPELAND, WELDON S. COPELAND, and WELDON S. COPELAND, JR.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,
John T. Adams, Clerk
by Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms. Denise Pacheco, Clerk
Mr. Edie Rubalcaba
Mr. Richard Chandler

APPENDIX A PAGE 2

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

EL PASO, TEXAS

RICHARD L. CHANDLER, Appellant,	)No. 08-97-00484-CV
v.	) Appeal from
RACHEL CHANDLER, WILLIAM R. COPELAND, and WELDON S. COPELAND, JR., Appellees.	) 41st District Court)of El Paso County, Texas) (TC# 77-1540

OPINION

Richard Chandler ("Richard"), appeals from a summary judgment, in favor of Rachel Chandler, Williarn R. Copeland, and Weldon S. Copeland, Jr., Appellees, and a, permanent injunction and permanent order to cease and desist. Finding no error, we affirm.

FACTUAL SUMMARY

The litigation between Richard and Rachel Chandler spans some nineteen years and, at a minimum, some ten

APPENDIX "B" PAGE

lawsuits in both state and federal courts scattered from El Paso to Lubbock to Austin. The driving issue, from Richard's perspective, is whether Rachel is entitled to an interest in his military retirement benefits. The underlying issue for our consideration is whether the Chandler marriage was valid or void. Because of the multiplicity of lawsuits and their resulting entanglement, we first provide a detailed chronology of events.

The Chandler Marriage and Divorce

On June 29,1942, Rachel married Pablo Torres Tovar in Mexico. While she claimed to have divorced him, there is no recorded divorce decree on file in Mexico. Rachel and Richard married on October 17, 1949, in Juarez, Mexico. On May 28, 1980, a final decree of divorce, entered in Cause No. 77-1540, dissolved the marriage. Pursuant to the decree, Rachel was awarded the following:

> The Court having found that [Richard] is retired from the United States Army and is currently receiving United States Army retirement pay on a monthly basis, and that such retirement pay constitutes vested contingent community property, [Rachel] is therefore awarded the sum of FOUR HUNDRED FIFTY DOLLARS ($450.00) per month from [Richard]'s monthly retirement pay if, as and when such benefits are paid to [Richard] and [Richard] shall hereafter remit to [Rachel] the sum of FOUR HUNDRED

> FIFTY DOLLARS ($450.00) from such retirement benefits, and [Richard] is hereby constituted a trustee for the purpose of receiving said sum of money hereinabove awarded to [Rachel] and [Richard] shall immediately upon receipt thereof, and not more than five (5) days after such receipt, remit said sum to [Rachel).

The Bill of Review

In June of 1981, Richard learned that Rachel may not have been divorced from Pablo Torres. As a result, he ceased paying any portion of the retirement benefits to Rachel as required under the decree. In August 1983, Rachel, through her attorneys, successfully applied to the United States Army Finance and Accounting Center (USAFAC) for direct payment of the benefits awarded to her. When the Army refused Richard's request that the direct payrnent be discontinued, Richard filed a bill of review, which although originally and mistakenly Docketed under the divorce Cause No. 77-1540, was subsequently redocketed as Cause No. 87-5225. Specifically, Richard alleged:

> [Richard] was prevented from asserting his right to a greater share of the parties' estate than that awarded to him pursuant to the above-described agreement and judgment by [Rachel]'s fraud in securing the agreement and [Richard]'s consent to entry of the judgment. Specifically, [Rachel], knowing that her representations

> and statements were false and with the intent to defraud [Richard], continually, through the entire duration of the purported marriage to [Richard], represented to [Richard] that she had been married (prior to the purported marriage to [Richard]), but had, in fact, received a divorce from her prior husband. In reliance on these representations, [Richard) entered into the purported marriage with [Rachel]. Contrary to [Rachel's representations, [Rachel] was previously married to another individual in Zacatecas, Mexico, which marriage was never dissolved by divorce, annulment, or death of either parties [sic]. As a result, the purported marriage between [Richard) and [Rachel] is void and of no effect.

He then sought the following relief:

> [Richard] requests that the Court set aside and cancel the settlement agreement signed by [Richard] and [Rachel] for the reasons set forth above; that the Court set aside the judgment rendered on May 28, 1980, which incorporated the terms of the property settlement agreement; and that the Court order a division of the estate of the parties in a manner that the Court deems just and right.

Despite his specific allegation that the marriage was void, Richard did not seek a declaratory judgment that the marriage was void. The only relief he requested was that the property settlement agreement be set aside and the property redivided. This omission will become significant, as we will detail.

On October 5, 1983, USAFAC sent a letter to Rachel advising her that because of the pending bill of review action, all

monies owed to her under the decree would be escrowed until the, litigation was concluded. For reasons unexplained in the record, the bill of review sat on the docket for some six and a half years. On April 6, 1990, the court entered an "Order Granting Partial Motion for Summary Judgment [sic]." This order provided:

> After viewing the evidence and upon conclusion of the arguments of counsel, the Court finds that the Petitioner, RICHARD L. CHANDLER, has established a prima facia case of a meritorious defense to the cause of action alleged to support the Judgment.
>
> IT IS, THEREFORE, ORDERED that Petitioner's Partial Motion for. Summary Judgment is granted as to the issue of a prima facia meritorious defense.
>
> The court finds that the Petitioner is entitled to a trial on the merits of those issues in his Original Petition for Bill of Review and the Answer thereto filed by the Respondent, as those pleadings may be amended prior to trial
>
> The case proceeded to a jury trial on March 18, 1991.

The charge inquired:

> Do you find that prior to the marriage of Richard L. Chandler in question in this case, Rachel Chandler knowingly made false representations as to material facts to Richard Chandler with the intent to induce him to enter into that marriage and that Richard Chandler

suffered a pecuniary loss as a proximate cause of his reliance on the representations?

You are instructed that when answering this question you are to limit your considerations to Rachel Chandler's representation, if any, that she had been divorced from Pablo Torres Tovar.

The jury answered "No." The court entered a take-nothing judgment on Richard's bill of review action. Richard appealed the judgment, and this court affirmed. *Chandler v. Chandler,* 842 S.W.2 (Tex.App.--El Paso 1992, writ denied). The mandate issued September 10, 1993.

The Litigation Explosion

Undeterred, Richard attacked on multiple fronts. Armed with the partial summary judgment we have already referenced, he visited with the legal assistance office of Reece Air Force Base. On December 14, 1993, a legal assistance attorney wrote to USAFAC advising them that

> Mr. Chandler was granted a Motion for Summary Judgment in which the court found as fact that Rachel Chandler entered in marriage with Richard Chandler without divorcing her first husband. Under Texas law, a marriage is void if either party was previously married and the prior marriage is not dissolved. Vernon's Texas Codes Annotated, Family Code Section 2.22, Acuna v. Sullivan, 765 F.Supp. 510 (1991). Property acquired during a putative marriage in Texas is not community property. Chapman v. Chapman , 11 Tex.Civ.App. 392. Therefore there is no basis upon which to make a

> community property division. It should be further noted that in the original divorce decree served on the Army that a specific finding of marriage is not made. Thus, the Army has no factual basis upon which to invoke the Former Spouses Protection Act and make any direct payments to the former Rachel Chandler.

Thereafter, in September of 1994, by this time a resident of Lubbock, filed suit against Rachel in Lubbock County seeking a declaratory judgment that the marriage and divorce decree were void. The suit asserts "that the order granting partial summary judgment fully adjudicated the suit to declare the parties' marriage void and the legal effect of such judgment is to render [Rachel] either a meretricious or putative former spouse neither of which status [sic] would have interest in the community property named in the decree of divorce." The trial court granted Rachel's motion to transfer venue and the case was filed under Cause Number 96-4533 in the 205th District Court of El Paso County.

On November 16 1994, Richard filed suit in Cause No. 87-5225 in the 41 st District Court of El Paso County seeking a declaratory judgment that the divorce decree and take-nothing judgment in the bill of review litigation were void.[1] The same

---

1 On May 17, 1989, apparedly during the bill of review proceeding, the judge of the 41st District Court entered a protective order requiring

day, in Cause No. 77-1540 in the 41 st District Court, he filed a motion for clarifying order, seeking an order requiring Rachel to revoke her application for direct payment of the military retirement benefits.[2] These pleadings give rise to the judgment from which Richard appeals. However, because a permanent injunction is at issue, we pause to note the filing of still other lawsuits.

In 1995 Richard filed suit against Rachel and USAFAC in Austin, Travis County, Texas. This suit was ultimately transferred back to El Paso County on a change of venue and was docketed as Cause No. 95-12922 in County Court at Law Number Four. It likewise sought a declaratory judgment as to the validity of the marriage, the rights of the parties under the

---

Richard to obtain leave of court prior to filing any grievance against Rachel's attorneys with the State Bar of Texas. The November 16 motion also sought leave to file grievances against William R. Copeland and Weldon S. Copeland, Jr.

2 As we have noted, the original divorce action between the Chandlers bore Cause No. 77-1540. The bill of review action was ultimately docketed as Cause No. 87-5225. The suit seeking to declare void both the divorce decree and the bill of review judgment was filed under the bill of review cause number. The motion for clarifying order, attempting to clarify the original decree, was filed under the divorce cause number. Thereafter, some pleadings were filed under the divorce cause number, others were filed under the bill of review cause number, and many were filed under both.

property settlement agreement and under the Uniformed Services Former Spouses' Protection Act (USFSPA).[3] At the Army's request, the suit was removed to federal court. A United States District Judge for the Western District of Texas, dismissed the suit and enjoined Richard from filing any lawsuits against Rachel based on "anything arising from or coming from or associated with the divorce case, Cause Number 77-1540."

Also in 1995, in a wholly separate proceeding, Richard filed suit in Cause No. 95-921 in the 205th Judicial Court in El Paso County, seeking a declaration that the marriage and divorce decree are void. Notwithstanding all of these lawsuits, Richard admittedly filed four or five other federal lawsuits against the United States government contending that his marriage to Rachel was void, Rachel was not named as a party to the latter suits. While he denied filing suit to compel a governmental official to deport Rachel from the United States, he admitted that he had filed a motion explaining "all the failures of her truthful affidavit, etc. as far as her prior marriage, not having children, profession that she was in and they said

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[3] 10 U.S.C. § 1408 (1998).

they couldn't -- . . . that I couldn't -- . . . I couldn't -- I was not a proper party to make that motion. And they denied the motion and that was the end of it." He also complained that federal officials were not "doing what they were supposed to do in examining the naturalization papers of people coming into this county [sic]."

Still further, while the record is not clear as to the dates of the order, a Lubbock County judge enjoined Richard from filing any further "frivolous lawsuits" against Rachel and sanctioned him $5,000, which he has not paid.

Procedural History of This Litigation

As we have already noted, on November 16, 1994, Richard filed suit in Cause No. 87-5225 in the 41 st District Court of El Paso County seeking a declaratory judgment that the divorce decree and take-nothing judgment in the bill of review litigation were void. The same day, in Cause No. 77-1540 in the 41 st District Court he filed a motion for clarifying order, seeking an order requiring Rachel to revoke her application for direct payment of the military retirement benefits. On January 17, 1995, Richard filed a motion for

summary judgment in Cause No. 87-5225 relating to the declaratory judgment. [4]

On January 17, Judge Mary Anne Bramblett, presiding judge of the 4 1 st District Court, requested the appointment of Judge Herb Marsh to preside in Cause No. 77-1540 due to her crowded docket. The next day, Judge William E. Moody, presiding judge of the Sixth Administrative Judicial Region, appointed Judge Marsh to hear the case. Appearing *pro se,* Richard wrote a letter to Judge Moody, dated February 7, 1995, regarding the appointment of Judge Marsh. Uncertain as to whether the letter constituted an objection, Judge Marsh telephoned Richard. Ultimately, on April 6, 1995, Judge Marsh presided over a hearing on motions for temporary and permanent Injunctions and on Richard's motion for summary judgment. Rachel and her attorneys filed their motion for summary judgment on April 11, and a second hearing related to the summary judgment motions was conducted on June 23. On June 29, Richard filed a motion to recuse Judge Marsh, which was duly referred to Judge Guadalupe Rivera of the 168th

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4 He also sought summary judgment on his motion for leave to file the grievances against Rachel's attorneys.

District Court on August 10. A recusal hearing was conducted on September 13, 1995. The order denying the motion to recuse was signed October 9, 1995. On Novernber 17, 1995, Richard filed a rnotion to challenge the visiting judge, and on November 30, he filed yet another objection to Judge Marsh.

In March 1996, Richard filed an application for temporary and permanent injunctions, seeking to enjoin Rachel from receiving direct payment of the retirement benefits and seeking to suspend Richard's obligation under the divorce decree to pay Rachel a portion of the retirement benefits. On February 20, 1997, Richard filed an amended motion for clarifying order and enforcement of the divorce decree, an action against Rachel and her attorneys for conspiracy and fraudulent concealment, and a suit for declaratory judgment that the marriage and decree were void. On February 24, he filed an amended motion for summary judgment on his "entire claim" against all defendants. On February 28, Richard filed a motion for sanctions and Rachel filed a motion for an order to cease and desist, seeking an injunction against Richard from filing an additional lawsuits or proceeding with any pending lawsuits against Rachel.

The Order

On March 14, 1997, Judge Marsh conducted the final hearing on the parties' motions for summary judgment and injunctive relief. The final order, entered May 14, 1997,

> * granted summary judgment to Rachel and her attorneys on the grounds that Richard's claims were barred by res judicata and statute of limitations;
>
> * found that the partial summary judgment was an interlocutory order which was invalidated and superseded by the final judgment in the bill of review;
>
> * found that the partial summary judgment was not a final judgment, was null and void and of no legal effect; and
>
> * found that Richard had wrongfully attempted to influence officials by representing the order as a valid, binding, operative order of the court.

The court then entered a permanent injunction and permanent order to cease and desist, providing:

> RICHARD CHANDLER is PERMANENTLY ENJOINED from and he is PERMANENTLY ORDERED TO CEASE AND DESIST in filing any new actions against or proceeding with any actions now pending against RACHEL CHANDLER, WILLIAM COPELAND, WELDON S. COPELAND, SR., WELDON S. COPELAND, JR., WALTER BOYAKI, JOHN MUNDIE, RALPH MIRANDA, and THE UNITED STATES OF AMERICA, INCLUDING

THE UNITED STATES ARMY, THE UNITED STATES TREASURY, and all other AGENCIES, BRANCHES, OR COMPONENT PARTS OF THE UNITED STATES GOVERNMENT.[5]

RICHARD CHANDLER is futher and additionally permanently enjoined from and he is permanently Ordered to cease and desist from representing or contending to any public officials in any form or forum that the Decree of Divorce rendered by this Court on May 28, 1980, in Cause No. 77-1540 in [sic] null or void or invalid or otherwise not a valid final judgment.

RICHARD CHANDLER is further and additionally permanently enjoined from and he is permanently Ordered to cease and desist from representing or contending to any public officials in any form that his marriage to RACHEL CHANDLER was null or void or invalid or otherwise not lawful or legal.

RICHARD CHANDLER is further and additionally permanently enjoined from and he is permanently Ordered to cease and desist from representing or contending to any public officials in any form or forum that the document filed in Cause No. 87-5225 on, May 25, 1990, entitled 'ORDER GRANTING PARTIAL MOTION FOR SUMMARY JUDGMENT' is a valid final judgment.

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[5] Aside flom Rachel, all of the named individuals are current or former attorneys involved in the Chandler litigation.

By ten points of error, Richard challenges the trial court's judgment. rules of *pro se* representation.We first address the rules of *pro se* representation.

PRO SE REPRESENTATION

At various times throughout the history of this litigation, Richard has opted to represent himself With regard to the proceedings at issue in this appeal, he has appeared in the trial court below and in this court pro se. Litigants choosing to appear pro se must comply with the applicable procedural rules and are held to the same standards that apply to licensed attorneys. *In re Estate Of Dilasky,* 972 S.W.2d 763 (Tex.App.--Corpus Christi 1998, no pet.); *Greenstreet v. Heiskell, 940* S.W.2d 831, 834 (Tex.App.--Amarillo 1997, no writ); *Clark v. Yarbrough,* 900 S.W.2d 406, 409 (Tex.App.--Texarkana 1995, writ denied). No allowance is to be made for the fact that a, litigant is not an attomey. Weaver v. E-Z Mart Stores Inc., 942S.W.2d 167,169 (Tex.App.--Texarkana 1997, no writ). To treat him differently would accord him an unfair advantage over litigants represented by counsel. *Mansfield State Bank v. Cohn,* 573 S.W.2d 181, 184(Tex. 1978); *Lin v. Houston Community College System,* 948 S.W.2d 328, 336 (Tex.App.--Amarillo

1997, writ denied). We apply these principles to the matters before us.

THE APPOINTMENT OF JUDGE MARSH

In his first three points of error, Richard contends that it was error for Judge Marsh not to recuse himself upon receipt of Richard's initial letter of objection, that it was error for Judge Rivera to deny the motion to recuse Judge Marsh, and that Judge Rivera erred in not filing findings of fact and conclusions of law following the recusal hearing. Additionally, while not raising it as a designated appellate issue, Richard contends that the appointment of visiting judges is improper and unfair, and should be of concern to this Court.

STATUTORY STRIKES

Statutory Authority

The Texas Government Code grants to the presiding judge of an administrative judicial region the power to assign visiting judges. TEX.GOVT CODE ANN. § 74.056 (Vernon 1998). Richard contends that a visiting judge may only be appointed in the absence of the presiding judge. Although the Government Code allows for the assignment of a visiting judge in the absence of the presiding judge, this provision is not

exclusive.TEX.GOV'T CODE ANN. § 74.056(c). Subsection (a) of § 74.056 specifically allows for the assignment of visiting judges in order to dispose of accumulated business. This procedure allows for courts to ease the heavy burden of already crowded dockets.

Claiming that the use of visiting judges is unfair, Richard argues that such a "dial-a-judge" system should be of concern to this Court. Overcrowded dockets are a major concern for every court, including the courts of appeals. The appointment of judges to assist in the disposal of cases on crowded dockets is allowed by the Texas Legislature in an attempt to ease this burden on the courts and to expedite the disposition of cases. We will be the first to recognize that the use of visiting judges has generated a great deal of public scrutiny. In a recent unanimous opinion, the Texas Supreme Court detailed the statutory development of the system authorizing the use of assigned judges. *Mitchell Energy Corp. v. Ashworth,* 943 S.W.2d 436, 438-40 (Tex. 1997). Prior to 1957, only sitting district judges could be assigned to another court. Legislative amendments in 1957 authorized the appointment of retired judges who were sixty-five years of age with at least ten years

experience to serve by assigmuent. Act of May 23, 1957, 55th Leg., R.S., ch. 408, § 1, 1955 TEX.GEN.LAWS 1236; *Mitchell*, 943 S.W.2d at 438. Twenty years later, the Legislature added former district judges who had not been defeated for re-election and were below the age of seventy as an additional category of judges eligible for appointment. Act of April 21, 1977, 65th Leg., R.S., ch. 115, § 2, 1977 TEX.GEN.LAWs 249; *Mitchell*, 943 S.W.2d at 438. Additional amendments followed in 1985 (qualifications revised to service of four years and omitting the prohibition against defeated judges), 1987 (judges eligible for appointment expanded to include retired or former statutory county court at law judges), and 1989 (litigants entitled to only one objection to an assigned judge of any kind). In 1991, the debate intensified, focusing on the assignment of defeated judges:

> The Legislature added subsection (d) to Section 74.053 as an amendment to House Bill 555 during the regular session of the 72nd Legislature in 1991. As initially proposed, House Bill 555 was intended to clarify the eligibility requirements to be assigned as a visiting judge. *See* COMMITTEE ON JUDICIAL AFFAIRS, BILL ANALYSIS, Tex.H.B.555,71st Leg.,R.S.(1989). During a public hearing on the bill the Senate Jurisprudence Committee conducted, several senators expressed dissatisfaction with the extent assigned

visiting judges were used, and urged that parties ought to have the right to have a locally elected judge decide their case. The Senators discussed a perceived problem, particularly in Harris County, that judges who had just been turned out of office by an election were returning to the same court as an assigned judge. The committee reported House Bill 555 with an amendment that would allow parties to object to the assignment of any judge other than current holders of elective office. *Public Hearing off H. B. 555 Before Senate Jurisprudence Committee*, 71 st Leg., R.S., (May 14, 199 1) tape available through the Senate Staff Services Office).

Section 74.053 clearly is intended to give parties the right to veto the assignment of certain former judges. The problem which motivated the legislation was the perceived abuse of the assignment system, in particular the use of judges who had been recently rejected by the electorate.

The solution aimed at mitigating the problem was to allow parties to object to some, but not all, former judges. The line of demarcation is experience. However, the Legislature intended to measure a judge's experience not merely by time put in as a judicial officer, but by service over a period of years with the approval of the electorate. The Legislature intended that a party may object to a former judge under Section-74.053(d), but not if the judge had served as an elected judge long enough to be vested under the retirement system. By promulgating Section 74.053(d), the Legislature distinguished two kinds of former judges: those who had vested when they left office, and those who had not.

Mitchell, 943 S.W.2d at 439-40.

Currently, TEX.GOV'T CODE ANN. § 74.053 provides:

§ 74.053. **Objection to Assigned Judge**

(a) When a judge is assigned under this chapter the presiding judge shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or part by the assigned judge.

(b) If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d) each party to the case is only entitled to one objection under this section for that case.

(c) An objection under this section must be filed before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside.

(d) A former judge or justice who was not a retired judge may not sit in a case if either party objects to the judge or justice.

Pursuant to this statutory scheme, there are three categories of judges eligible for assignment, "regular," "retiree," and "former" judges.

A 'regular' judge is one who is a current officeholder of another court. TEX.GOV'T CODE § 74.054(a)(1), (a)(5), (b). A 'retiree' judge is one who, as discussed earlier, is a judge receiving an annuity under the Judicial Retirement System. The Code does not specifically define the term 'former judge,' but the Code requires that both former and retiree judges have served as a regular judge for a minimum of forty-eight months. Id. § 74.055(c)(1), (e). Thus, a former judge for

> purposes of assignment may be defined as one who has served as a regular judge for at least forty-eight months, but who is not a retiree judge.[6]

Michell, 943 S.W.2d at 439.

Thus, if a party to a civil case files a timely objection, the judge may not hear the case. TEX.GOV'T CODE ANN. § 74.053(b). Under this section, a timely objection is defined as one filed before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside. TEX.GOV'T CODE ANN. § 74.053(c). A litigant may object to a "regular" or "retiree" judge only once in a civil case. TEX.GOV'T CODE ANN. § 74.053(b). However, there is no limit to the number of objections which may be lodged against the assignment of a "former" judge. We turn now to the specific complaints concerning the appointment of Judge Herb Marsh.

Just as there are three classifications of assigned judges, there are three methods or remedies prescribed by our system of jurisprudence for the challenge to a judge. "Judges may be

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6 We pause to note that the debate over the use of visiting judges is ongoing. At least three bills have been presented for consideration in the 76th Legislative Session altering the qualifications of an assigned judge by requiring additional years of service on the bench and/or preventing assignment of a defeated judge in the county of defeat.

removed from a particular case either because they are constitutionally disqualified, Tex. CONST. art. V, § because they are subject to a statutory strike, TEX.Gov'T CODE § 74.053(d), or because they are recused under rules promulgated by [the Supreme] Court. Tex.R.Civ.P. 18a, 18b; Tex.R.App. 16." *In re Union Pacific Resources Company*, 969 S.W.2d 427, 428 (Tex. 1998). Our first inquiry is whether Judge Marsh was properly appointed to hear any or all of the Chandler proceedings. Second, we will address whether Richard properly objected to the appointment of Judge Marsh, and if so, whether he later waived it.

General or Blanket Assignment

On January 17, 1995, Judge Mary Anne Bramblett requested that the presiding judge of the Sixth Administrative Region assign Judge Herb Marsh to preside over *Chandler v. Chandler, et al.*, Cause No. 77-1540 Cause No. 77-1540 for the duration of the case due to her crowded docket. The next day, Presiding Judge William E. Moody entered a written order of assignment, specifically noting:

> This assignment will begin on the 18th day of January 1995, and will continue for the period of time that may be deemed necessary for the assigned Judge to

> complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of cases tried by the Judge herein assigned during this period.

Although the request for assignment specified a particular docket number of the case assigned, the assignment itself did not. Instead, it was a blanket assignment. Reading it together with the request, it appears that Judge Marsh was appointed to preside over Cause No. 77-1540 and all other matters "growing out of that case,

Ordinarily, a visiting judge sitting under a general assignment and presiding over any pretrial hearing is authorized to hear all related proceedings, including a trial on the merits. *Bourgeois v. Collier*, 959 S.W.2d 241, 244 (Tex.App.--Dallas 1997, no writ); *Money v. Jones*, 766 S.W.2d 307, 308 (Tex.App.--Dallas 1989, writ denied). Several appellate decisions have referred to assignments containing the "growing out of language utilized here. *See Starnes v. Chapman*, 793 S.W.2d 104, 105 (Tex.App.--Dallas 1990, orig. proceeding); *Bourgeois*, 959 S.W.2d at 244. The two lawsuits in issue here, Cause No. 77-1540 and Cause No. 87-5225, stem directly from the same dispute -- the validity or invalidity of the Chandler marriage, the Chandler divorce decree and Rachel's entitlement

to an interest in Richard's military retirement benefits. Judge Marsh was specifically requested to preside over the cause number reflecting the original divorce action. The bill of review action grew directly out of the divorce action; indeed it sought to set aside the divorce decree itself. The additional filings relate to Richard's efforts to declare void the original decree of divorce, the bill of review judgment, the underlying marriage, and failing that, to clarify that Rachel was not entitled to direct payment of the benefits awarded her under the decree. We find no fundamental impediment to the use of the general or blanket assignment at issue here and conclude that Judge Marsh was properly appointed.

The Objection

Richard asserts that his February 7, 1995 letter to Judge Moody constituted a timely objection and that Judge Marsh's removal was automatic. In his letter, he stated:

> 4. The judge requested to hear this case is Herb Marsh, whom I believe is the judge that refused to hear an injunction action concerning the same subject matter as the motion to clarify, which may indicate he has a bias against me.
>
> If I have been given formal notice of the assignment request for the purpose of my submitting objections or waiving such by not answering, I submit the foregoing for consideration

and appropriate action. If such request is a form of recusal I would request that such be disclosed rather than the request be granted on grounds of a crowded docket.

My only concern is having a fair and impartial hearing on my claim.

Upon receipt of the letter, Judge Marsh telephoned Richard in order to ascertain whether his letter constituted an objection to the appointment.[7] The parties agree in part, and disagree in part as to the nature of the conversation. Judge Marsh described it as follows:

> By that letter I couldn't tell whether he was objecting to me hearing this case or not. And that's the reason I called him. I called him from Judge Bramblett's office and called his number in Lubbock. And I said, 'I have your letter here.' I said, 'I don't recall anything about what you have put in your letter. I don't recall any contact, any previous case. Would you explain to me what it was,' and he did. And he thought that I had refused to hear something in that '77 case. And I told him I had no recollection of it at all.
>
> He said it had something to do when his lawyer then had come in to see me in the courtroom. That was in-'80-something, and had come back out and

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[7] While Richard was under no duty to explain any objection he may have had, he was under a duty to disclose whether or not his letter constituted an objection.

told him I wouldn't hear anything. I told him I had no recollection of that at all. But if he was objecting to me sitting on the case, I would honor his objection and not take the assignment. And he said, 'No, that's all right.' Said, 'Just go ahead. I agree that you hear the case and take on the case and do the hearings and summary judgments,' and I just go ahead and set them. So that's when we proceeded to set the April 6th hearing on summary judgments.

JUDGE RIVERA: And Mr. Chandler appeared at that first hearing of April 6th and participated in the hearing, and it was not until towards the end of the proceedings that he voiced dissatisfaction?

JUDGE MARSH: He made no objection whatever at the April 6th hearing. None whatever.

We find Richard's sworn statements contained within his motion to recuse significant:

1. On January 17, 1995, the permanent judge of said court, the Honorable Mary Anne Bramblett, requested the assigranent of Judge Marsh to preside over: RICHARD CHANDLER VS. RACHEL CHANDLER, 77-1540.

2. Thereafter, Judge Marsh consulted with plaintiff to determine whether there was objection to his presiding over said cause. Plaintiff indicated there had been an incident in the past that may prevent his being assigned to the case, but at the time all the facts could not be recalled.

3. Plaintiff advised Judge Marsh that there was more than one cause of action filed in the said court and he

indicated that he would be presiding over such actions. However, there has never been any order consolidating the other action into 77-1540, or any order from the 6th Administrative Region assigning Judge Marsh to the other case filed in said court, Cause No. 87-5225.

4. Thereafter plaintiff indicated that he had no objection to Judge Marsh presiding over Cause No, 77-1540. [Emphasis supplied].

The motion to recuse was signed and sworn to by Richard on June 23, 1995.

Waiver

We disagree with Richard that the provisions of § 74.053(b) and (e) do not apply to challenges under § 74.053(d). Even an objection to a "former" judge, as opposed to a "retired" judge, must be timely.[8] The objection must be the first matter presented to the visiting judge for a ruling. *Morris v. Short,* 902 S.W.2d 566, 569 (Tex.App.--Houston [1 st Dist.] 1995, writ denied).This requirement imposes an obligation on the complaining litigant to urge the objection at the commencement

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8 Me purpose of the rule was perhaps best explained in *Logic Sciences, Inc. v. Smith,* 798 S.W.2d 394, 395 (Tex.App.--Houston [1 st Dist.] 1990, orig. proceeding). "To allow untimely objections such as this would encourage litigants to delay objections until they 'get a feeling' for how a judge is going to rule in a case--a situation the statute is designed to prevent." Id. at 395.

of the first hearing, if it has not already been determined by the visiting judge stepping aside or by the administrative presiding judge directing the visiting judge to step aside. The objection must be presented to the assigned judge and ruled upon as a preliminary matter before the upon to trigger any mandatory prohibition. Id. While we consider the letter to Judge Moody to be, a timely written objection we conclude Richard waived his entitlement to the statutory strike. He admittedly told Judge Marsh that he had no objection to his hearing matters arising from Cause No. 77-1540. After the telephone conversation, Richard forwarded to Judge Marsh motions and setting requests arising from both Cause No. 77-1540 and Cause No. 87-5225. Richard appeared at a hearing on April 6. He has not brought forward a reporter's record of that proceeding, nor has he ever suggested, through sworn testimony or otherwise, that he presented any objection to Judge Marsh presiding over Cause No. 87-5225 at the beginning of that hearing. Judge Marsh testifided that Richard did not present any objection at any point during the April 6 hearing; in fact the record reflects that he did not advise Judge Marsh of any complaint until the end of the June 23 hearing when he mentioned a motion to recuse. Once

Judge Marsh presided over the April 6 hearing, which encompassed both Cause Nos. 77-1540 and 87-5225, without Richard urging his objection, he waived his entitlement to the statutory strike.[9] Later efforts to cure his error, through the portions of the motion to recuse addressing § 74.053, the subsequent motion to challenge visiting judge, filed November 17, 1995, and the last objection to visiting judge, dated November 30, 1995, were untimely and of no avail.

The Motion To Recuse

The Grounds

On June 29, 1995, Richard filed a motion to recuse Judge Marsh alleging:

> * Judge Marsh demonstrated bias against Richard such that he cannot preside fairly over the proceedings; and

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[9] Richard suggests that his entitlement to the statutory strike cannot be waived, citing this Court's opinion in *Lone Star Industries, Inc. v. 4ter*, 845 S.W.2d 334 (Tex.App.--El Paso 1992, orig. proceeding). We find his reliance misplaced. There, Judge Ater had not at the time of his assignment designated his election to serve as an assigned judge. Finding that the question of the qualification of a retired judge to serve on assignment is a jurisdictional question, the court concluded that the relator had not waived his right to object. Id. at 336. There has been no allegation raised here *thatJudgeMarsh had not complied with the prerequisites to appointment as a visiting judge.* In as much as jurisdiction has not been implicated, *Lone Star* is inapplicable.

* Judge Marsh had personal knowledge of a disputed fact in the case and cannot preside fairly over the proceedings.

In support of these allegations, Richard alleged that he had been a defendant in an action styled *Alamo Pipe and Supply v. Richard L. Chandler, Individually, and dlbla Skyline Plumbing and Hardware* which was filed in the 243rd Judicial District Court when Judge Marsh was the presiding judge:

> Plaintiff had knowledge that plaintiff Alamo was represented by attorney Robert T. Schwarzbach, who, prior to Judge Marsh's taking the bench was in the partnership of Schwarzbach - Gade - Marsh. After a hearing in the *Alamo* case, attorney Gade was advised by plaintiff that Judge Marsh may be asked to recuse himself because of his prior relationship with Alamo's attorney.
>
> Thereafter, plaintiff was advised of Judge Marsh's displeasure with the recusal suggestion.
>
> About 1985, plaintiff was seeking an injunction against Rachel Chandler preventing her from receiving direct payment of his retired pay. At that time she was represented by Weldon S. Copeland, Jr. who is also a third-party defendant in Cause No. 77-1540. On the date for the 1985 injunction hearing the judge of the 41st district court was not available and Judge Marsh was asked to hold the hearing which concerned Army retired pay.

After some discussion of the injunction Judge Marsh declined to hear the injunction on the basis that plaintiff raised his association with Alamo and had suggested his recusal.

In this case, the same injunction has again been presented to Judge Marsh and he simply refuses to rule on it in any manner.

The Hearing

A hearing on the motion to recuse was held on September 13, 1995 before Judge Rivera. Richard testified in accordance with the allegations set forth in the motion. In turn, Judge Marsh testified:

> The original reason for his objection to me, I 'mean, that February letter where he mentioned some involvement with that '77 case, I guess it was, I think that case is up there on your bench --
>
> And I looked through it at one point. I found one order that I had signed in that case as presiding for Judge McKellips,[10] and it says Herb Marsh, Jr., and written under it, 'presiding,' which means it was something Judge McKellips had done and I was just signing it because he was gone or something. That's all it was. That's all it indicates.

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10 Judge McKellips was the presiding judge of the 4ist District Cou.: prior to his defeat byhis successor, Judge Mary Anne Bramblett.

I don't recall -- I have no recollection at all of anything ever -- even that, I had to find that to even refresh my memory on that. But I heard no part of that case and I don't recall ever being asked to hear part of the case. And all the file reflects, I believe, is that I signed this one order, may have been setting a hearing or may have been denying an injunction or whatever. I signed it for Judge McKellips as presiding on something he'd already done. That's the only action I'd taken. And as to my knowledge, that's the only contact I've ever had with that case at all.

The Ruling

At the conclusion of the hearing, Judge Rivera announced her ruling:

The Court finds that the objection filed by Mr. Chandler or the letter sent to Judge Moody by Mr. Chandler, if it states an objection, was waived by Mr. Chandler, and that he submitted to the court's jurisdiction, or to Judge Marsh's presiding over the matter, and thus, any objection was waived.

And the Court further finds that Mr. Chandler has not shown clearly or any legal basis for the Court granting the motion to recuse that I'm taking up here this afternoon, or no legal basis or grounds for the granting of the motion to recuse.

A written order denying the motion was signed on October 9, 1995. It provides:

On the 13th day of September, 1995, Plaintiff's Motion to Recuse and Disqualify Judge was heard and considered by the Court, and after considering the

evidence presented in support of the Motion to Recuse and Disqualify Judge, the Court finds that there is not sufficient evidence to grant Plaintiff's Motion.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiff s Motion to Recuse and Disqualify Judge is hereby denied.

In his second point of error, Richard asserts that it was an abuse of discretion for the trial court to deny his motion.

Standard of Review

The standard of review for the denial of a motion to recuse is whether the trial court abused its discretion. *Aguilar v. Anderson,* 855 S.W.2d 799, 801 (Tex.App.--El Paso 1993, writ denied). The test for an abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *Id.* The fact that the trial court decided the issue differently than the reviewing court would have does not indicate an abuse of discretion. Id. Nor does a mere error in judgment rise to such a level. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 23 8, 241-42 (Tex. 1985).

In some instances, Texas appellate courts have applied the reasonable person standard in determining whether a recusal motion should have been granted. *Ludlow v. DeBerry,* 959 S.W.2d 265, 281 (Tex.App.--Houston [14th Dist.] 1997,

n.p.h.); *Aaguilar v. Anderspm*, 855 S.W.2d at 804-05 (Osbom, J. concurring opinion). A reasonable person standard is appropriate because the rule provides for recusal where a judge's impartiality might reasonably be questioned. Tex.R.Civ.P.18b(2)(a). However, in applying the reasonable person standard, it must be determined whether the alleged act indicating bias or impartiality emanated from an extrajudicial source S.W.2d at 281.*Ludlow, 959*

The United States Supreme Court discussed the "extrajudicial source" doctrine in *Liteky v. U.S., 510* U.S. 540,114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). *Ludlow*, 959 S.W.2d at 271. Although the Court was construing the federal disqualification rule, it contains essentially the same language as Rule 18b. The Court stated that opinions formed by the judge on the basis of facts introduced or events occurring during proceedings do not constitute a basis for a recusal motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Id. Thus, the Supreme Court reasoned that judicial remarks during the course of a trial that are critical or disapproving or even hostile to counsel, parties, or their cases, ordinarily do not support recusal. Id.

Such remarks *may* do so if they reveal an opinion deriving from an extrajudicial source and such remarks will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. Id.

In determining whether to apply the extrajudicial source rule when a litigant cites Rule 18b(2)(a), a court must consider the facts upon which recusal is sought. *Ludlow*, 959 S.W.2d at 282. Here, Richard complains of Judge Marsh's testimony at the recusal hearing. Richard asserts that "Judge Marsh's opposition was extraordinary and openly aligned him with appellees and against Richard. . . . " . Regardless of how a litigant phrases his motion to recuse or on which section of Rule 18b(2) he relies, the extrajudicial source rule applies to a recusal motion, such as the one in this case, that targets judicial statements regarding the case and made during the course of proceedings. *Ludlow*, 959 S.W.2d at 282-83. The fact that Judge Marsh gave testimony in contravention of Richard's allegations does not demonstrate anything other than factual disagreement.

Impartiality

Applying the extrajudicial source rule to the facts of this case, Richard has not demonstrated an abuse of discretion. The

actions he complains about arose during the recusal hearing, and he has not shown that these statements emanated from any source other than the judge's opinion based on his perception of the evidence presented. None of the statements by Judge Marsh indicate such a "high degree of favoritism or antagonism as to make fair judgment impossible.", *Ludlow, 959* S.W.2d at 283, *citing Liteky, 5*1 0 U.S. at 555, 114 S.Ct. at 1157. In fact, after a complete review of the record of the recusal hearing, we can find no statements made by Judge Marsh which would openly align" him with Rachel. Judge Marsh gave a procedural recitation, but he made no statements in favor of or against either of the parties.

Richard also contends that Judge Marsh's "opposition and active participation in the recusal proceedings can only lead to his recusal." In support of his contentions, Richard cites to *Monroe v. Blackmon,* 946 S.W.2d 533, 538 (Tex.App.--Corpus Christi 1997, no writ) and *Blanchard v. Krueger,-916* S.W.2d 15 (Tex.App.--Houston [1st Dist.] 1995, orig. proceeding). His reliance is misplaced. In *Monroe,* a litigant sought the recusal of the trial judge because the opposing counsel represented the judge in a separate proceeding. In *Blanchard,* the trial judge

who was the subject of the recusal action took the extraordinary step of filing a general denial and request for attorney's fees, thus becoming a party to the underlying suit. At that point, the judge's disqualification was mandatory inasmuch as he had become a party to the suit and was seeking damages in the form of attomey's fees.

That is not the case here. Merely testifying at a hearing does not constitute "active participation." Further, we disagree with Richard's suggestions in this Court that the basis for his motion to recuse was constitutional disqualification. "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case." TEX. CONST. art. V, § 11. To warrant constitutional disqualification, a judge's "interest" must be a direct pecuniary or property interest in the subject matter of the litigation. *Palais Royal, Inc. v. Partida,* 916 S.W.2d 650, 653 (Tex.App.--Corpus Christi 1996, orig, proceeding). While a judge's ability to be fair is an appropriate issue for consideration in a recusal action under the Texas Rules of Civil Procedure, "fairness" is

not a consideration in constitutional disqualification. *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 558 (Tex.App.-- Beaumont 1993, writ denied). We conclude that it was not an abuse of discretion for Judge Rivera to deny Richard's motion to recuse on the basis of impartiality.

Failure to Allow Richard to Develop Record

Richard next contends that Judge Rivera abused her discretion by failing to allow him to develop a record to support his motion. At the inception of the hearing, the following exchange between Richard and the court took place:

JUDGE RIVERA: Would you announce for the record, sir, your name.

CHANDLER: Yes, ma'am. Name is Richard Chandler. And I'm pro se and I'm --

JUDGE RIVERA: All right. Would you please present your evidence to the Court, sir.

CHANDLER: Does the Court wish that I take the stand to be swom to enter the evidence, or can I just enter the evidence?[11]

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[11] In his brief, Richard makes a passing reference to the fact that none of the parties were sworn during the hearing, which he contends is a violation of due pwcess. Our review of the record indicates that Richard never requested that Judge Marsh be sworn nor objected to the trial court's failure to swear the witnesses. Accordingly, he has waived error. TEX.R.APP.P.33.1(a).

JUDGE RIVERA:, What is your evidence going to consist of.?

CHANDLER: I have about 12 or 13 exhibits.

JUDGE RIVERA: First of all, let's focus on what it is that you are representing to the Court.

Thereafter, Richard proceeded to outline his case for approximately six pages in the record. At no time during the hearing did Richard attempt to offer any exhibits into evidence even though he had ample opportunity to do so. Richard made no complaint during the hearing that he was not allowed to present his evidence or exhibits. In fact, during the course of the hearing, Judge Rivera I asked Richard several times if he had anything to add, at which time he had the opportunity to expand on his case. Since Richard failed to complain to the trial court and obtain a ruling on his complaint, he has failed to preserve the issue for appellate review. TEX.R.App.P. 33.1 (a)(1).

Oral Order vs. Written Order

Richard's next contention is that the order entered October 9, 1995 is substantially different from the finding announced at the hearing. This argument is without merit. As we have detailed above, the motion was denied on the basis that

Richard failed to present sufficient evidence in order for the court to grant his motion. The record indicates that Judge Rivera stated that "the Court further finds that Mr. Chandler has not shown clearly or [given] any legal basis for the Court granting the motion to recuse . . . or no legal basis or grounds for the granting of the motion to recuse." The order entered on October 9, 1995, states that "after considering the evidence presented in support of the Motion to Recuse and Disqualify Judge, the Court finds that there is not sufficient evidence to grant Plaintiff s Motion." While the verbiage is not *exactly* the same, we cannot find that it is substantially different. Both the oral order and the written order deny the motion on the grounds that Richard failed to produce evidence which would support the court's granting of the motion. Further, Richard's reliance on *Keim v. Anderson*, 943 S.W.2d 938 (Tex.App.--El Paso 1997, no writ) is misplaced. Keim addressed the issue of the oral rendition of judgment. Judge Rivera did not render judgment on the merits, she ruled on a pretrial motion.

Inaccurate Case Number

Richard complains that the order denying the motion to recuse was entered in Cause No. 87-5225. He suggests that this

was improper and implies it constitutes error because Judge Rivera knew that Judge Marsh was only assigned in Cause No. 77-1540 and that the motion to recuse was filed in Cause No. 77-1540. Throughout the pendency of this case, there has been confusion regarding the case numbers. The record is replete with pleadings on file having one case number while others have both case numbers. The motion to recuse was filed under Cause No. 77-1540, while the order denying the motion was filed under Cause No. 87-5225. We have already concluded that the general assignment of Judge Marsh encompassed both causes of action. Any discrepancy was merely a *de minimus* typographical error. Inasrnuch as error, if any, was *de minimus,* it was harmless and does not invalidate the order. *Ex parte Benitez,* 590 S.W.2d 704, 707 (Tex. 1979); *Ex parte Williams, 866* S.W.2d 751, 754 (Tex.App.--Houston [1st Dist.] 1993, no writ).

Findings of Fact and Conclulsions of Law

Richard's final contention regarding the denial of his motion to recuse is that the trial court erred in failing to file findings of fact and conclusions of law as requested. In Point of

Error Three, Richard presumably[12] is arguing that the judgment must be reversed because the trial court failed to issue separate written findings of fact and conclusions of law. We disagree.

A party may request that the court file its findings of fact and conclusions of law in any case tried without a jury. TEX.R.Civ.P. 296. The purpose of the rule is to give a litigant the right to findings of fact and conclusions of law following a conventional bench trial on the merits. IKB *Industries (Nigeria) Ltd. v. Pro-Line Corp,* 938 S.W.2d 440, 442 (Tex. 1997). In other cases findings and conclusions are proper, but a party is not entitled to them. id.

A hearing on a motion to recuse is not a "case tried without a jury;" it is purely a pretrial matter. While findings in certain pretrial and post-trial matters may be helpful, they are not required *Osborn v. Osborn,* 961 S.W.2d 408, 411 n.3 (Tex.App.--Houston [IstDist.]1997, pet. denied) (hearing on motion for new trial is not a "case tried without a jury," but findings can be helpful); *IKB Industries (Nigeria) Ltd,* 938

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[12] In his brief, although Richard states that it was harmful error for the trial court not to file findings of fact and conclusions of law, he fails to request a remedy for the error. Therefore, we will presume ftt he is requesting this Court to reverse the trial court's order.

S.W.2d at 442 (findings not required where judgment rendered as sanction for discovery abuse, but findings for imposing sanctions may be helpful). In a case like this one in which an order is entered denying the motion to recuse, findings for denying the motion may be helpful, but they are not required. Id. As a practical matter, they are often unnecessary, and requiring them in every case would unduly burden trial courts. Id.

Even if we were to decide that Richard was entitled to findings,we would conclude that any error was harmless. As a general rule, the failure of the trial court to file findings of constitute error where the complaining party has complied with the requisite rules to preserve error. *Martinez v. Molinar* (178 S.W.2d 117, 119 (1944); *FDIC v. Morris,* 782 S.W.2d 521, 523 (Tex.App.--Dallas 1989, no Writ). There is a presumption of harmful error unless contrary appears on the face of the record. *Martinez,* 953 S.W.2d at 401; *City of Los Fresnos v. Gonzalez,* 830 S.W.2d.627 (Tex.App.--Corpus Christi 1992, no writ). Thus, the failure to make findings does not compel reversal if the record before the appellate court affirmatively demonstrates that the complaining party suffered no harm.

Martinez, 953 S.W.2d at 401; *Las Vegas Pecan & Cattle Co., Inc. v. Zavala County*, 682 S.W.2d 254,256 (Tex. 1984). Where there is only one theory of recovery or defense pleaded or raised by the evidence, there is no demonstration of injury. *Martinez*, 953 S.W.2d at 401; *Guzman v. Guzman*, 827 S.W.2d 445 (Tex.App.--Corpus Christi 1992, writ denied); *Vickery v. Texas Carpet Co., Inc.*, 792 S.W.2d 759 (Tex.App.--Houston [14th Dist. 1990, writ denied). *Accord, Landbase, Inc. v. ZPEC*, 885 S.W.2d 499, 501-02 (Tex.App.--San Antonio 1994, writ denied)(failure to file findings and conclusions harmless where the basis for the court's ruling was apparent from the record).

The test for determining whether the complainant has suffered harm is whether the circumstances of the case would require an appellant to guess the reason or reasons that the judge has ruled against him. *Sheldon Pollack Corp. v. Pioneer Concrete of Texas, Inc.*, 765 S.W.2d 843, 845 (Tex.App.--Dallas 1989, writ -denied); *Fraser v. Goldberg*, 552 S.W.2d 592, 594 (Tex.Civ.App.-- Beaumont 1977, writ ref'd n.r.e.) we need not guess as to the reason the trial judge ruled against Richard in his motion to recuse. The order (both oral and again

as written) clearly states that the motion was denied on the basis that Richard failed to present sufficient evidence. Therefore, the order of the trial court properly identified the basis of its ruling and it was not error for the trial court to refuse to file separate findings of fact and conclusions of law.

Having found that the appointment of Judge Marsh was proper, that it was not an abuse of discretion to deny the motion to recuse and that it was not error for the trial court to refuse to file findings of fact and conclusions of taw regarding the hearing on the motion to recuse, we overrule the first three points of error.

NO VARIANCE EXISTS

In Point of Error Four, Richard contends that the trial court erred in entering its written order of May 12, 1997 without having set aside its oral rendition of judgment announced at the conclusion of the hearing on March 14, 1997. Specifically he argues that "the oral judgment of March 14th was final and the trial court could not entertain a motion for summary (sic) after the time for filing a motion for new trial expired which was April 13, 1997." In support of this argument, he once again cites us to *Keim*, 943 S.W.2d at 942.

In Keim, the trial court had granted interim attorney's fees in favor of Mrs. Keim's attorney, which were only paid by Dr. Keim in part. On June 20,1995, Kathleen Anderson, Mrs. Keim's attorney, withdrew of record. Ten days later, the parties appeared with their attorneys in open court and announced a Rule 11 stipulation, which was filed of record. The stipulation did not include the requirement that Dr. Keim pay the interim attorney's fees which had previously been ordered. During the prove-up of the agreement, both of the parties testified that they had entered into the agreement after consultation with their respective attorneys. The agreement encompassed conservatorship, child support, and the division of marital assets. No one mentioned the resolution of the temporary orders or the order for interim fees. The trial court accepted the stipulation, and granted the divorce. Later that afternoon, Anderson filed a petition in intervention, seeking to enforce the interim fee award. On July 31, 1995, Mrs. Keim filed a motion for entry of judgment in accordance with the stipulated agreement. Dr. Keim objected to the untimeliness of Anderson's intervention. Following a hearing, the trial court overruled the objection to the intervention, took judicial notice of the prior

interim fee award, and ruled that the interim fee order had not been withdrawn by the stipulation and that it would be included in the final decree of divorce. On appeal, Dr. Keim contended that the trial court could not alter the parties' stipulated agreement, upon which the trial court had rendered judgment, without setting aside the prior ruling. This Court first determined that judgment had been orally rendered at the June 30 hearing, that Anderson's intervention could not be filed or considered after judgment unless the prior judgment was set aside, that the trial court had not set aside the prior judgment before considering the petition in intervention, and that reversible error had occurred. The oral rendition of judgment accepting and approving the stipulated agreement of the parties differed from the final written order. It was the variance that was impermissible. We concluded that "[i]f an appellate court determines that the decree contains terms and provisions dividing the community property that were never agreed to by the parties, it must reverse the judgment and remand the cause." Id. at 946, *citing In the Matter of the Marriage of Ames,* 860 S.W.2d 590, 594 (Tex.App.--Amarillo 1993, no writ). However when the record reflects merely a clerical variance between a

judgment announced in open court and the judgment eventually signed by the trial court, an appellate court may modify the judgment to correct the mistake. *Keim,* 943 S.W.2d at 946, *citing McLendon v. McLendon,* 847 S.W.2d 601, 610 (Tex.App.--Dallas 1992, writ denied). In comparing the oral pronouncement with the written order here, we find no fatal variance, and Richard points us to none. Lastly, we disagree with Richard that the trial court lost plenary power on April 13, 1997. Pursuant to TEX.R.Civ.P. 329b(d), the trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed. Accordingly, Judge Marsh was well within its plenary power when the final judgment was signed on May 12. Point of Error Four is overruled.

SUMMARY JUDGMENT

In Points of Frror Five, Six, and Ten, Richard asserts that the trial court erred in granting Rachel's motion for summary judgment, in denying his own motion for summary judgment and in denying his motion to declare his marriage to Rachel void. Richard's motion, filed under both Cause No. 77-

1540 and No. 87-5225, sought summary judgment on "his entire claim" and specifically requested a finding that:

> * direct payment of the military retirement benefits by USAFAC to Rachel violates both USFSPA and the terms of the decree of divorce;
>
> * the Chandler marriage is void;
>
> * the decree of divorce is void; and
>
> * the final judgment in the bill of review action is void.

Rachel sought summary judgment on the basis that Richard could not recover on any of his requests for declaratory judgment because his claims were barred by *res judicata.* As to his request for clarification of the divorce decree, Rachel contended Richard lacked standing and that there had been no unintended results because of the Army's direct payment of the benefits to her. She also alleged that the direct payment provisions of USFSPA were applicable to the divorce decree. Lastly, Rachel and her attorneys sought summary judgment as to Richard's suit for conspiracy, fraudulent concealment, and breach of fiduciary duty on the basis that the statute of limitations barred his claim.

The standard of review upon appeal of a summary judgment is whether the successful movant at the trial level

carried its burden of showing that there is no genuine issue of material fact and that a judgment should be granted as a matter of law. *Lear Siegler, Inc. v. Perez,* 819 S.W.2d 470, 471 (Tex. 1991); *Nixon v. Mr. Property Management Co., Inc.,* 690 S.W.2d 546, 548 (Tex. *1985); Cortez v. Liberty Mutual Fire Ins. Co.,* 885 S.W.2d 466, 469 (Tex.App.--El Paso 1994, writ denied). Thus, the question on appeal is not whether the summary judgment proof raises fact issues as to required elements of the movant's cause or claim, but whether the summary judgment proof establishes, as a matter of law, that there is no genuine issue of material fact as to one or more elements of the movant's cause or claim. *Gibbs v. General Motors Corporation,* 450 S.W.2d 827,828 (Tex. 1970).

In resolving the issue of whether the movant has carried this burden, all evidence favorable to the non-movant must be taken as true and all reasonable inferences, including any doubts, must be resolved in the non-movant's favor. *Nixon,* 690 S.W.2d at 548-49; *DeLuna v. Guynes Printing Company of Texas, Inc.,* 884 S.W.2d 206,208 (Tex.App.--El Paso 1994, wril denied). Where the defendants are the movants and they submit summary judgment evidence disproving at least one

essential element of each of plaintiff s causes of action, then summary judgment should be granted. *Perez*, 819 S.W.2d at 471; *Bradley v. Quality Service Tank Lines*, 659 S.W.2d 33, 34 (Tex. 1983); *Cortez*, 885 S.W.2d at 469. Furthenuore, when a trial court's order granting summary judgment does not specify the ground or grounds relied on for the ruling, summary judgment will be affirtned on appeal if any of the theories advanced are meritorious. *State Farm Fire & Casualty Co. v. S. S. & G. W.*, 85 8 S.W.2d 374, 3 80 (Tex. 1993); *Rogers v. Ricane Enterprises, Inc.*, 772 S.W.2d 76, 79 (Tex. 1989).

Here, the final judgment specifies that Richard's claims were fully resolved by the final decree of divorce and the subsequent bill of reviewjudgment such that his asserted causes of action are barred by *res judicata*. This finding addresses Richard's requests that the marriage, the divorce decree, and the bill of review judgment be declared void. The final order further specified that the bill of review action alleged fraud, that Richard had notice or should have had notice of any causes of action no later than June 5, 1987 and that all actions filed by him after June 5, 1991 are barred by limitations. This finding addresses Richard's claims against Rachel and her attomeys for

conspiracy, fraudulent concealment, and breach of fiduciary duty.

We first address whether the doctrine of *res judicata* barred certain of Richard's claims. If so, then denial of his motion and the granting of Rachel's motion were not error.

Res Judicata

Upon discovering that his marriage may have been void under former TEX.FAM.CODE ANN. § 2.22 (Vernon 1996),[13] Richard filed a petition for bill of review which was ultimately assigned Cause No. 87-5225. In his petition, Richard requested "that the Court set aside and cancel the settlement agreement signed by Richard] and [Rachel]" and "that the Court order a division of the estate of the parties in a manner that the Court deems just and right." Significantly, the petition did not seek a declaration that the Chandler marriage was void, nor did it seek

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[13] Title I of the Texas Family Code was recodified by Acts 1997, 75th Leg., R.S., ch. 7, § 1, 1997 Tex.GEN.LAWS 8, eff. April 17, 1997. Specifically former § 2.22 has been recodified as § 6.202(a). Id., at 26. Section 4,of the Act provides that "[t]he change in law made by this Act does not affect a proceeding under the Family Code pending on the effective date of this Act. A proceeding pending on the effective date of this Act is governed by the law in effect at the time the proceeding was commenced ..... Acts 1997, 75th Leg., R.S., ch.7, § 2, 1997 TEX.GEN.LAWS 43. Because this proceeding was commenced prior to the recodification, we refer to the former statutory provisions."

a declaration that the, decree of divorce was void. It merely asked that the property settlement agreement be set aside and that the court re-divide the property of the parties.

A bill of review is an independent equitable action that a party to a previous action brings seeking to set aside the prior judgment that is no longer appealable or subject to the trial court's plenary power. *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex.- 1979); *Lawrence v. Lawrence*, 911 S.W.2d 443, 446 (Tex.App.--Texarkana 1995, writ denied). After the expiration of plenary power, the trial court cannot set aside a judgment except by bill of review for sufficient cause, filed within the time allowed by law. TEX.R.Civ.P. 329b(g); *Lawrence*, 911 S.W.2d at 446-47. To be successful in a bill of review, the plaintiff must allege and prove:

* a meritorious defense to the cause of action alleged to support the judgment,

* which fraud, accident, or the opposing party's wrongful act prevented him from presenting,

* without any fault or negligence of his own.

Baker, 582 S.W.2d at 406-07; *Lawrence*, 911 S.W.2d at 447. The plaintiff must as a pretrial matter present *prima facie* proof to support the meritorious defense. *Baker*, 582 S.W.2d at 408;

Lawrence, 911 S.W.2d at 447. The relevant inquiry is not whether the result would be different on retrial, but instead whether the defense is barred as a matter of law and whether the complainant will be entitled to judgment if no evidence to the contrary is offered. *Baker*, 582 S.W.2d at 408-09; *Lawrence*, 911 S.W.2d at 447; *Brooks v. Associates Financial Services Corp.*, 892 S.W.2d 91, 94 (Tex.App.--Houston [14th Dist. 1994, no writ). This is a question of law. *Baker*, 582 S.W.2d at *408-09; Brooks*, 892 S.W.2d at 94. If the court determines that the plaintiff has not made out a *prima facie* meritorious defense, it ends the proceeding and dismisses the suit.*Baker*, 582 S.W.2d at 409; *Lawrence*, 911 S.W.2d at 447. The court will proceed to trial only if a *prima facie* meritorious defense has been set forth. *Baker*, 582 S.W.2d at 409; *Lawrence*, 91 S.W.2d at 447.

On May 25, 1990, the trial court granted partial summary judgment, finding the Richard had presented a *prima facie* meritorious defense and was entitled to a trial on the merits. We emphasize that the order *did not* hold that Richard's marriage to Rachel was void, nor could it, inasmuch as Richard had not sought that relief. A summary judgment may not grant

more relief than requested.*Mafige v. Ross*, 866 S.W.2d 590, 592 (Tex. 1993.).

On March 18, 1991, the case proceeded to trial before a jury. The jury found that Rachel had not knowingly made false representations to Richard in order to induce him to enter into marriage. Although Richard based his theory of recovery on the issue of whether the marriage was void, that issue was not submitted to the jury for a factual determination. Nor did Richard request that the trial court, as a matter of law, declare the marriage void. Although he appealed the final judgment of the trial court, he failed to raise on appeal the issue of whether the marriage was void. Instead, he challenged the sufficiency of the evidence, contending that the jury's failure to find that Rachel fraudulently induced him to marry her was against the great weight and preponderance of the evidence. In finding the evidence sufficient, the court recounted the controverting evidence tendered by Rachel to rebut the *prima facie* showing. *Chandler*, 842 S.W.2d at 833.

Accordingly, the partial summary judgment did not constitute a declaration that the marriage was void. Moreover, we further reject Richard's argument that it constituted a final

judgment such that the later take-nothing judgment entered against him in the bill of review action is void. Our inquiry does not end there, however. We must next determine whether the bill of review judgment operates as a bar to this lawsuit. We conclude that it does.

Texas uses a transactional approach in examining whether a claim is barred by *res judicata. Barr v. Resolution Trust Corp.* 837 S.W.2d 627, 631 (Tex. 1992); *Campos v. Ysleta General Hospital, Inc.*, 879 S.W.2d 67, 73 (Tex.App.--El Paso 1994, writ denied). The principles of the doctrine mandate that a party may not dispute matters distinctly put in issue and directly determined by a court of competent jurisdiction in a prior suit as a ground of recovery or defense in a later suit between the same parties. *Marange v. Marshall,* 402 S.W.2d 236, 239-40 (Tex.Civ.App.--Corpus Christi 1966, writ ref'd n.r.e.). Not only does *res judicata* apply as a bar in a later lawsuit between identical parties who appeared in a prior lawsuit if the cause of action asserted in the later lawsuit has been decided previously with finality by a court of competent jurisdiction, [14] it also bars the litigation of an issue which

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[14] *Texas Water Rights Commn v. Crow Iron Works,* 582 S.W.2d 768, 771-

through the exercise of diligence could have been raised in the previous lawsuit. *Campos*, 879 S.W.2d at 73.

Richard could have sought a declaration in the bill of review litigation that the underlying marriage was void. He chose not to do so. Instead, he sought to set aside the property division, and obtain a re-division, because of Rachel's purported fraud. The doctrine of *res judicata* was designed to address precisely the situation at issue. Richard has filed no less than ten lawsuits across the state of Texas seeking a declaration that the marriage was void. He testified:

> QUESTION: Mr. Chandler, please do not take offense to this, because I don't mean it to be that way. What will it take for you to stop filing lawsuits against Rachel Chandler or against other people contending, among other things, that you never had a valid marriage to Rachel Chandler, that the marriage was not valid; what will it take you to stop filing those lawsuits?
>
> RICHARD CHANDLER: Well, until somebody says that the divorce decree is valid and somebody says that the marriage is not void, that has not been determined. No court has said that the marriage is valid.

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72 (Tex. 1979).

Let us be clear. Richard's marriage to Rachel is not void. When two or more marriages of a person to different spouses are alleged, the most recent marriage is presumed to be valid as against each marriage that precedes the most recent marriage until one who asserts the validity of a prior marriage proves the validity of the prior marriage. TEX.FAM.CODE ANN. § 2.01 (Vemon 1996). [15] We thus begin with the presumption that the Chandler marriage is valid Richard shouldered the burden of establishing otherwise.He attempted to do so through his bill of review action and he failed. While we agree with his premise that a void judgment is subject to a collateral attack, we disagree that a litigant may have two, three, five, or ten bites at the apple to establish that the underlying judgment is void. His bill of review action served as a collateral attack, He was unsuccessful in establishing that his marriage was void and that the decree of divorce was void. The decree of divorce having withstood a collateral attack, is valid. Accordingly, it was not error for the trial court to deny Richard's motion for summary

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[15] Former § 2.01 has been recodified as § 8, eff. April 17, 1997. .1 02. Acts 1997, 75th Leg., R.S., ch. 7, § 1, 1997 TEX.GEN.LAWS 8, eff. April 17, 1997.

judgment to the extent it sought a declaration that the marriage was void, the decree of divorce was void, and that the final judgment in the bill of review action was void. Summary judgment in favor of Rachel was properly granted on the basis *of res judicata*.

Statute of Limitations

Richard filed his second amended petition for conspiracy, fraudulent concealment, and reach of fiduciary duty on Febnmry 20, 1997. As the basis for his suit he alleged:

> * Rachel had represented to him that her first marriage had been dissolved by divorce, that there was no record evidencing any divorce, that the marriage was void, that Rachel was not a former spouse as contemplated by USFSPA, and that she was not entitled to direct payment of any military retirement benefits;
>
> * In July of 1983, Rachel "solicited and obtained the assistance" of Weldon S. Copeland, Jr. "in a conspiracy to injure [Richard] by getting the Army to make direct payment of the $450.00 to Rachel." By agreement, Rachel and Copeland agreed to prosecute an enforcement against Richard for recovery of benefit arrearages. In return, Copeland was to receive one-third of the arrearages recovered up to $10,000.00 and one-third of each direct payment of $450.00 made by the Army to Rachel.
>
> * In 1989, Weldon S. Copeland, Jr. withdrew as Rachel's attorney and was replaced by William

Copeland, "who entered into the conspiracy established between Rachel and Weldon with full knowledge of the facts."

* The goal of the conspiracy was to defraud Richard of $450.00 of his monthly retirement benefits. The goal was accomplished "because Rachel, with assistance of Weldon and William, fraudulently concealed the fact that she never judicially terminated her prior marriage."

* Rachel had a fiduciary duty to disclose to Richard that her prior marriage was not judicially terminated and her failure to disclose her undissolved prior marriage constituted a fraudulent concealment.

* Weldon and William knowingly participated in and facilitated the breach of Rachel's fiduciary duty.

Richard sought actual and punitive damages.

Fraudulent concealment is not an independent cause of an action; it is an affirmative defense to statutes of limitations. *Arabian Shield Development Co. v. Hunt*, 808 S.W.2d 577, 584 (Tex.App.--Dallas 1991, writ denied). Stated simply, it is a basis for application of the discovery rule. The plaintiff must show the existence of the underlying tort, the defendant's knowledge of the tort, the defendant's use of deception to conceal the tort, and the plaintiff's reasonable reliance on the deception. Id. Limitations begin to run from the time the fraudulent concealment is discovered or should have been

discovered within the exercise of reasonable diligence. *Eichel v. Ullah,* 831 S.W.2d 42, 45 (Tex.App.--El Paso 1992, no writ). We construe Richard's pleadings as claims for conspiracy, fraud, and breach of fiduciary duty. Accordingly, we must first determine the applicable statute of limitations for each tort alleged, and secondly, the date on which Richard discovered the alleged tort. The statute of limitations for civil conspiracy is two years. Tex.Civ.PRAC.&REM.CODE ANN. § 16.003 (a)(Vemon Supp. 1999); *In re Estate of Herring,* 970 S.W.2d 583, 586 (Tex.App.-- Corpus Christi 1998, no pet.); *Connell v. Connell,* 889 S.W.2d 534, 541 (Tex.App.--San Antonio 1994, writ denied). Ordinarily, a claim for fraud or misrepresentation is governed by a four-year statute of limitations. TEX.CIV.PRAC.&REM.CODE ANN. § 16.004(a)(3)(Vernon 1986); *Williams v. Khalaf,* 802 S.W.2d 651, 656-57 (Tex. 1990). Because a breach of fiduciary duty subsumes a claim of constructive fraud, it is also governed by the four-year statute of limitations. *Estate of Herring,* 970 S.W.2d at 587.

Richard obtained information in June of 1981 which led him to believe that Rachel had not been divorced from her first husband. On August 29, 1983, Richard received a letter from

USAFAC notifying him that Rachel would receive direct payment of her portion of the military retirement benefits. All of these facts were known to Richard at the time he filed his bill of review action; indeed it was Rachel's purported misrepresentation that formed the basis of that suit. The latest date of any purported wrongdoing alleged in Richard's petition is 1989, the date on which William Copeland replaced Weldon S. Copeland, Jr. as Rachel's attorney.[16] Even if we were to broadly construe Richard's November 16, 1994 Motion for Court to Grant Leave for Richard L. Chandler to File a Grievance Against William Copeland and Weldon S. Copeland and Motion to Declare judgments Void[17] as alleging tortious conduct by Rachel and her aftomeys, the two-year statute of limitations ran no later than December 31, 1991 and the four year statute of limitations expired no later than December 31, 1993. This suit was not filed until some ten months later. The

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[16] The record does not contain a precise date as to the substitution of counsel. For purposes of considering the statute of limitations issue, we will accord Richard's pleading every deference and assume that the substitution occurred on December 31, 1989.

[17] We reiterate that it was this pleading that commenced the lawsuit giving rise to the judgment at issue in this appeal.

second amended petition which specifically set forth the claims for conspiracy, fraud, and breach of fiduciary duty was not filed until February 20, 1997. Accordingly, Richard's claims are barred by limitations. Summary judgment granted on these claims in favor of Rachel and her attorneys was proper.

Clarification

The remaining issue in our summary judgment consideration is Richard's motion for clarification of the decree of divorce. In his second-amended petition, Richard alleged that the provision for the division of retirement benefits contained in the decree of divorce was unambiguous. He requested the court to "determine that movant and Rachel did not intend for the Army to make payment of the $450.00 to Rachel, but rather it was their intent that movant make such payment to Rachel if, as and when movant shall receive his Army retired pay." He sought summary judgment declaring that direct payment of the military retirement benefits by USAFAC to Rachel violates both USFSPA and the terms of the decree of divorce. In his brief, he argues that at best, Rachel is a putative former spouse and not entitled to any of the military retirement benefits; that under the property settlement agreement, there was no intent that the

Army make direct payments; and that USFSPA is not applicable to the Chandler divorce decree. We have already determined that the Chandler marriage was not void; as a result Rachel is a former spouse as defined by USFSPA. We turn first to the issue of intent and second to the question of direct payment.

Intent

Enforcement of the division of property awarded by a divorce decree is governed by TEX.FAM.CODE ANN. § 3.71 (Vernon 1993)[18] which provides in relevant part as follows:

> (a) [A] court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. Further orders may be entered to enforce the division, but these orders shall be limited to orders in aid of or in clarification of the prior order. The court may specify more precisely the manner of effecting the property division previously made if the substantive division of property is not altered or changed ....
>
> (b) An order under this section that amends, modifies, alters, or changes the actual, substantive division of property made or approved in a final decree of divorce or

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18 Title 1 of the Texas Family Code was recodified by Acts 1997, 75th Leg., R.S., ch. 7, § 1, 1997 TEX.GEN.LAws 8, eff. April 17, 1997. Specifically former § 3.71 has been recodified as § *9.001 etseq. Id.* at 37. Because this proceeding was commenced prior to the recodification, we refer to the former statutory provisions.

annulment is beyond the power of the divorce court to enter and is unenforceable.

TEX.FAM.CODE ANN. § 3.7 1 (a) and (b). A property settlement agreement, although incorporated into a final decree of divorce, is treated as a contract and its legal force and its meaning are governed by the law of contracts, not by the law of judgments. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984); *Dechon v. Dechon*, 909 S.W.2d 950, 956 (Tex.App.--El Paso 1995, no writ). If a contract is unambiguous, the courts will give effect to the intention of the parties as expressed in the agreement. *Dechon*, 909 S.W.2d at 956. The entire agreement must be interpreted in such a way that all its provisions are given effect and that none are rendered meaningless. *See Soto v. Soto, 936* S.W.2d 338, 341 (Tex.App.-El Paso 1996, no writ); *Praeger v. Wilson*, 721 S.W.2d 597, 600-01 (Tex.App.--Fort Worth 1986, writ ref d n.r.e.). In other words, every attempt must be made to harmonize all of the provisions within the agreement. *Soto*, 936 S.W.2d at 341. Each provision must be considered with reference to the whole agreement. Id. A contract is ambiguous only if there is uncertainty as to which of two meanings is correct. *Dechon*, 909 S.W.2d at 956; *Kurtz v. Jackson*, 859 S.W.2d 609, 611 (Tex.App.-Houston [1st Dist.]

1993, no writ). Only if the agreement is ambiguous may parol evidence be considered. *Soto,* 936 S.W.2d at 341; *Phillips v. Parrish, 814* S.W.2d 501, 503 (Tex.App.--Houston [Ist Dist.1991, writ denied). Ambiguity is a question of law for the court. *Soto,* 936 S.W.2d at 341; *Pierce v. Pierce,* 850 S.W.2d 675, 679 (Tex.App.--El Paso 1993, writ denied). If the court determines that the language is ambiguous, the interpretation is a fact issue to be resolved by the fact finder. *Soto,* 936 S.W.2d at 342.

Orders for enforcement are limited to orders in aid or clarification of the prior order. *McPherren v. McPherren,* 967 S.W.2d 485, 490 (Tex.App.--El Paso 1998, no writ); *Dechon, 909* S.W.2d at 956; former TEX.FAM.CODE-ANN.§3.71(a). Such orders may more precisely specify the manner of carrying out the property division previously ordered so long as the substantive division of the property is not altered. *McPherren,* 967 S.W.2d at 490; *Dechon,* 909 S.W.2d at 956. Former § 3.72(b) provided that a clarification order may only be made upon a finding, express or implied, that the original form of the division of property lacks sufficient specificity to be enforced by

contempt. Id. Here, Richard's second amended petition specifically alleged that the decree was unambiguous and capable of enforcement by contempt. Accordingly, parol evidence of the parties' intent regarding direct payment was inadmissible. Instead, the intent must be construed from the four corners of the agreement. The decree specified:

> IT IS ORDERED, ADJUDGED AND DECREED that Petitioner and Respondent shall execute all instruments necessary to effect this Decree and that Petitioner and Respondent shall have all appropriate and necessary writs, execution, and process, as many and as often as necessary to accomplish the execution and final disposition of this judgment.

The decree was signed by the parties and their respective attorneys, indicating approval as to both content and form. This provision assured each party that s/he would have all enforcement mechanisms available to accomplish the division of property. Richard admittedly stopped payment of Rachel's interest in the retirement benefits, leaving her in a position to obtain enforcement through any means available. We conclude that the agreement is unambiguous and that direct payment of the retirement benefits to Rachel violates neither the decree of divorce nor the specific intent of the parties. We next address whether direct payment violates USFSPA.

The Uniformed Services Former Souses' Protection Act USFSPA)[19]

The Way We Were

At the time of the Chandler divorce, military retirement benefits earned during marriage, both vested and contingent, were community property subject to division on divorce *Cearley v. Cearley,* 544 S.W.2d 661, 662, 666 (Tex. 1976). On June 26, 1981, the United States Supreme Court issued its decision in *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The issue before the Court was whether, upon dissolution of marriage, federal law precludes a state court from dividing nondisability retired pay pursuant to state community property laws. Answering this question in the affirmative, the Court noted that only Congress could take action to afford the former spouse a remedy.

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[19] For an excellent discussion of USFSPA, *see* Marshal S. Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE, American Bar Association (1 998) and David R. McClure, *Retirement Benefits - Federal and Private,* STATE BAR OF TEXAS MARRIAGE DISSOLUTION INSTITUTE at X (1 993).

Of immediate concern was the enforceability of *pre-McCarty* decrees in which a former spouse was awarded an interest in military retirement benefits. The Fifth Circuit determined in *Erspan v. Badgett*, 659 F.2d 26, *reh. denied en banc*, 659 F.2d 26, 28 (5th Cir. 198 1) that a 1963 Texas divorce decree was enforceable and entitled to *res judicata*. The Texas Supreme Court addressed the issue in *Segrest v. Segrest*, 649 S.W.2d 610, 613 (Tex. 1983), holding that *McCarty* was not retroactive. For those cases which were on appeal at the time of the *McCarty* decision, the ruling was held to be applicable. *Trahan v. Trahan*, 626 S.W.2d 485, 487 (Tex. 1981)(applying *McCarty* to a case pending in the Texas Supreme Court concerning a partition of military retirement benefits); *Mattern v. Mattern*, 624 S.W.2d 400, 400 (Tex.Civ.App.--Fort Worth 1981, no writ)(applying *McCarty* to a case pending in the court of appeals concerning a division of military retirement benefits on divorce).

Enforceabilty of *Pre-McCarty* Decrees

Passage of the Act

Congress responded quickly to the *McCarty* challenge. It passed the Uniformed Services Former Spouses' Protection

Act (USFSPA) on August 18, 1982 and the bill was signed by then President Reagan on September 8, 1982. By its terms, USFSPA took effect on February 1, 1983, but it provided that courts had the ability to effectuate divisions of milituy retired or retainer pay as of June 25, 1981. This date was the day before the issuance of the *McCarty* decision, demonstrating the intent of Congress to obliterate the effect of that ruling. By virtue of USFSPA, the ability to divide military retirement benefits was returned to the states. 10 U.S.C. § 1408(c)(1) provided:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The legislative history of the Act reveals the intention to remove the federal preemption and to permit state courts to apply state community property laws in determining whether military retired or retainer pay should be divisible upon divorce. S.Rep. No. 97-502 p. 16, *reprinted in* 1982 U.S.CODE CONG.&ADMIN.NEWS P. 1611. Benefits may be divided without regard to the length of the marriage. While there is no limitation on the number of years of marriage required for

divisibility of the benefits, there is a ten year requirement before a former spouse is entitled to receive direct payment. 10 U.S.C. § *1408(d)(2); Oxelgren v. Oxelgren,* 670 S.W.2d 411, 413 (Tex.App.-Fort Worth 1984, no writ).

Gross v. Net Benefits

Once the issue concerning the ten-year requirement was resolved, the debate focused on whether state courts could apportion gross military retirement benefits received or to be received, or whether the courts were limited by 10 U.S.C. § 1408(c)(.1) to divide only the disposable retired or retainer pay. In Texas, that dispute was settled by the Texas Supreme Court in *Grier v. Grier,* 731 S.W.2d 931 (Tex. 1987), with the Court concluding that USFSPA did not limit the amount of retirement benefits that could be characterized or apportioned under Texas community property laws; the statutory provisions were intended only as a limit on the amount of disposable retired pay which could be garnished and subjected to direct payment. Id. at 933. When faced directly with the question, the United States Supreme Court disagreed. In *Mansell v. Mansell,* 490 U.S. 581, 109 S.Ct. 2023, 104 L.Fd.2d 675 (1989), the Court determined that while USFSPA authorized state courts to treat disposable

retired pay as community property, it did not authorize the courts to treat total retired pay as community property. Id. at 589, 109 S.Ct. at 2029. In effect the decision overruled *Grier*.

Effect of *Mansell* on Res Judicata Principles

Once again, a debate ensued: What effect did *Mansell* have on prior Texas decrees? The Texas Supreme Court addressed this issue in *Berry v. Berry*, 780 S.W.2d 846 (Tex.App.Dallas 1989), *revd*, 786 S.W.2d 672 (Tex. 1990). The Berrys were divorced in 1980 with Mr. Berry ordered to pay Mrs. Berry 25 percent of his gross Air Force disability retirement pay, which Mr. Berry had elected to receive in lieu of military retirement benefits. In 1987, Mr. Berry waived a portion of the disability pay in exchange for similar benefits from the Veterans Administration, reducing his gross pay from $2,422 per month to $1,067 per month.[20] He adjusted the payments to his former spouse accordingly. Mrs. Berry

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[20] Military retirees may receive disability benefits only to the extent that they waive a corresponding amount of military retirement pay. However, because disability benefits are exempt from federal, state and local taxation, military retirees who waive retirement pay in favor of disability benefits increase their after-tax income. 10 U.S.C.§§ 3101(a),3105; *Mansell*,480 U.S. at 583-84, 109 S.Ct. at 2026.

attempted to enforce the prior order, but the trial court overruled the motion. The court of appeals, relying upon *Mansell*, determined that USFSPA barred state courts from treating, as property divisible upon divorce, military retirement pay waived to receive Veterans Administration disability benefits. In reversing, the Supreme Court noted:

> The court of appeals apparently determined that retroactive application of USFSPA to a final divorce decree was required because *Mansell* permitted modification of a property settlement that had become final prior to the statute's enactment. The court of appeals failed to observe that the result in *Mansell* was based on a determination by the California Court of Appeals that it was appropriate, under California law, to reopen the final settlement order. . . *Mansell* does not dictate a similar result under Texas law. The Supreme Court explicitly left the question of retroactive application of the USFSPA to state courts.

Id. at 673. The Court then applied the principle of *res judicata* to enforce the pre-USFSPA decree. *See also, Elliott v. Elliott*, 797 S.W.2d 388, 391 (Tex.App.--Austin 1990, no writ)(holding that neither USFSPA nor *Mansell* was retroactive in its effect as a general rule).

Direct Payment for Pre-USFSPA Decrees

Richard takes these general principles and argues that since USFSPA is not to be applied retroactively, the Act's provision for direct payment cannot be utilized to obtain direct

payment of benefits awarded in a pre-USFSPA decree. We look first to the specific provisions of the Act. The enabling section provides in part:

> (b) Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title [February 1, 1983], but without regard to the date of any court orde. *However, in the case of a court order that be came final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.* [Emphasis supplied].

Section 1006 of Pub.L. 97-252, as amended Pub.L. 98-94, Title IX, § 941 (c)(4), Sept. 24, 1983, 97 Stat. 654; Pub.L. 98-525, Title VI, § 645(b), Oct. 19, 1984, 98 Stat. 2549.

Richard argues that this language, as applied to the *pre-McCarty* Chandler decree, means that payments may only be made as provided for in the decree, i.e., that Richard will pay to Rachel her share of the benefits as he receives them. In other words, he contends that direct payment is an unauthorized modification. We disagree. Not only must we review the statutory language in USFSPA, we must also review the language found in the Code of Federal Regulations. USFSPA

provided that the secretaries of the armed services shall prescribe uniform regulations for the administration of the Act. 10 U.S.C. § 14080). The regulations were implemented on January 18, 1985 and appear at 32 C.F.R. §§ 63.1-63.6. *See* 50 Fed. Reg. 2,667 (1985).They were amended once, following the 1986 amendments to USFSPA. *See* 52 Fed. Reg.25, 215 (1987). Pertinent to our analysis, § 63, establishes the purpose of the regulations: "Under 10 U.S.C. 1408, this part establishes policy and authorizes direct payments to a former spouse of a member from retired pay in response to court-ordered alimony, child support, or division of property." The procedures for obtaining direct payment are contained within § 63.6. Subsection (c)(7) provides:

> Court orders awarding a division of retired pay as property that were issued before June 26, 1981,[21] shall be honored if they otherwise satisfy the requirements and conditions specified in this part. A modification on or after June 26, 1981, of a court order that originally awarded a division of retired pay as property before June 26, 1981, may be honored for subsequent court-ordered changes made for clarification, such as the interpretation of a computation formula in the original court- order. For court orders issued before June 26,

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21 We reiterate that the *McCarty* decision issued on June 26, 1981.

> 1981, subsequent amendments after that date to provide for a division of retired pay as property are unenforceable under this part. If the court order awarding a division of retired pay as property is issued on or after June 26, 1981, subsequent modifications of that court order shall be honored if they otherwise satisfy the requirements and conditions specified in this part.

32 C.F.R. § 63.6(c)(7).

Thus, the secretaries of the armed services have determined that if a *pre-McCarty* decree divided military retirement benefits, direct payment may be obtained. If that decree Is modified for purposes of clarification, such as the interpretation of a computation formula, direct payment may be obtained for the clarification order. Direct payment is not available for a modification order of a pre-*McCarty* decree that did not divide mllitary retirement benefits at the time of divorce. Direct payment is available for *post-McCarty* decrees and modifications if the order otherwise satisfies the requirements of the Act.[22]

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[22] At least one commentator has suggested that direct payment is not permissible with regard to a post-June 26, 1981 partition order because a partition order does not fall within the definition of "court order, contained within 10 U.S.C. § 1408 (a)(2). David R. McClure, *Retirement Benefits - Federal and Private,* STATE BAR OF TEXAS MARRIAGE DISSOLUTION INSTITUTE at X-35 (1993).

The "modification"[23] language is significant and requires discussion. Congress amended USFSPA on November 5, 1990, altering 10 U.S.C., § 1408(c)(1) as follows:

> A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 26, 198 1, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's former spouse.

As for the effective date of the amendment, the statute provided:

> The amendment made by subsection (a) [amending subsection (c)(1) of section 14081 shall apply with respect to judgments issued before, on, or after the date

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[23] While the Family Code prohibits the post-judgment modification of a division of property contained within a decree of divorce, post-divorce partition of undivided property is expressly authorized. Fortner TEX.FAM.CODE ANN. §§ 3.71(a)[now codified at § 9.007(a)]; 3.90 [now codified at § 9.2011; 3.91 [now codified at § 9.2031; 3.92 [now codified at § 9.2041. Under this statutory scheme, it is quite possible that the overall percentage distribution of the community estate effectuated at divorce will be substantially altered as a result of the partition.

> of the enactment of this Act. In the case of a judgment issued before the date of the enactment of this Act, such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act.

Pub.L. No. 101-510, § 555(e), 104 Stat. 1569, 1570 (1990), amended.by Pub.L. No. 102-190. § 1062(a)(1), 105 Stat. 1475 (1991). The reasons for this amendment are clear from the legislative history:

> The committee is concerned because some state courts have been less than faithful in their adherence to the spirit of the law. The reopening of divorce cases finalized before the Supreme Court's decision in *McCarty v. McCarty* that did not divide retired pay continues to be a significant problem. Years after final divorce decrees have been issued, some state courts ... have reopened cases (through partition actions or otherwise) to award a share of retired pay. Although Congress has twice stated in report language that this result was not intended, the practice continues unabated. Such action is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate.

H.R.Rep. No. 665, 101stCong.,2dSess.279, reprinted in 1990 U.S.CODE CONG.& ADMIN. NEWS p. 3005.

The impact of the amendment spurred further debate and spawned additional litigation. The Trahans offer a perfect example.The Trahans were married in 1943 and divorced for

the first time in 1963. They remarried in 1970 and were divorced again in 1971. Neither divorce decree referenced Mr. Trahan's military retirement benefits. In 1977, Mrs. Trahan filed a partition action and she was granted a portion of the benefits. While the case was on appeal, the *McCarty* opinion issued and the Texas Supreme Court ultimately reversed and rendered judgment in Mr. Trahan's favor. *Trahan v. Trahan,* 626 S.W.2d 485 (Tex. 1981). In February 1983, after the passage of USFSPA, Mrs. Trahan filed another partition action; she was awarded 38.96 percent of Mr. Trahan's benefits. The case went up the appellate ladder once again, with the judgment affirmed. *Trahan v. Trahan,* 682 S.W.2d 332 (Tex.App.--Austin 1984, writ ref d n.r.e.), *dismd,* 475 U.S. 1002, 106 S.Ct. 71, 89 L.Ed.2d 291 (1986). After passage of the 1990 amendment to USFSPA, Mr. Trahan filed suit for a declaratory judgment, contending that the amendment was intended to be retroactive and that it nullified the partition judgment. The trial court granted the relief requested. On appeal, Mrs. Trahan contended that the amendment to USFSPA did not preempt application of the common law doctrine of *res judicata.* The appellate court agreed, noting that her property right in the military retirement

benefits vested when the partition judgment was affirmed in 1984; *res judicata* barred reopening the issue of whether she possessed a property interest. Because the subsequent amendment of USFSPA did not destroy her property right, the declaratory judgment was reversed. Both the Texas Supreme Court and the United States Supreme Court denied review. *Trahan v.Trahan,* 894 S.W.2d 113 (Tex.App. S.Ct. 2515,135 L.Ed.2d 203 (1996). Austin 1995, writ denied), *cert. denied,* 517 U.S. 1251, 116 S.Ct. 2515,135 L.Ed.2d 203 (1996).

The impact of the amendment on the common law doctrine of tenancy-in-common is less Under Texas law, upon entry of a final decree of divorce, the former spouses hold any undivided community property as tenants-in-common which is subject to partition in a post-divorce proceeding. *Busby v. Busby,* 457 S.W.2d 551, 554-55 (Tex. 1970). One commentator has suggested that a *pre-McCarty* decree that fails to specifically mention military retirement benefits nevertheless "treats" a community interest in the benefits by converting it nto tenancy-in-common property.William A. Reppy, Jr., *The 1990 U.S.FS.P..4. Amendment: No Bar to Recognition of Tenancy in*

Common Interests Created by Pre-McCarty Divorces that Fail to Divide Military Retirement Benefits, 29 IDAHO L.REV. 941, 948 (1992). One intermediate appellate court has agreed. *Walton v. Lee,* 888 S.W.2d 604, 605 (Tex.App.--Beaumont 1994, writ denied), *cert. denied,* 516 U.S. 870, 16 S.Ct. 190, 13 3 L.Ed.2d 127 (1995)(holding that under Texas law the courts automatically treat or reserve jurisdiction to treat retired pay by virtue of common law theories governing ownership of undivided property such that subsequent partition is not precluded by federal law). Directly contra is *Knowles v. Knowles, 81* 1 S.W.2d 709 (Tex.App.--Tyler 199 1, no writ)(holding that because a 1972 divorce decree did not purport to divide the military retirement benefits, the 1990 amendment to USFSPA precludes a subsequent partition). The Texas Supreme Court has yet to address the issue. *Buys v. Buys,* 924 S.W.2d 369, 3 75 (Tex. 1996)("We do not consider and express no opinion on whether the 1990 amendment preempts a community property state court's ability to partition 'tenancy in common' military retirement benefits earned during marriage but not awarded in the final divorce decree."). Yet another court has concluded that where a 1988 agreed partition

order divided military retirement benefits which were undivided in a *pre-McCarty* decree, the 1990 amendment to USFSPA would not preclude enforcement. *Ex parte Kruse,* 911 S.W.2d 839, 841 (Tex.App.--Amarillo 1995, orig. proceeding)("Even though the amended USFSPA has retroactive application to preempt state community property law in those situations to which it applies, that is far different from the question whether USFSPA preempts the common law doctrine of res judicata.").

Accordingly, we conclude that direct payment to Rachel of her interest in Richard's military retirement benefits, as requested by her and as granted by USAFAC, is not an unauthorized modification of the decree and does not violate USFSPA. Points of Error Five, Six, and Ten are overruled.

THE PERMANENT INJUNCTION

In Points of Error Seven, Eight, and Nine, Richard challenges the trial court's entry of an order which permanently enjoins him from:

> * Filing any new actions against or proceeding with any actions pending against Rachel, William Copeland, Weldon S. Copeland, Sr., Weldon S. Copeland, Jr., Walter Boyaki John Mundie, Ralph Miranda, and the United States of America, including the United States Army, the United States Treasury, and all other

Agencies, Branches, or Component Parts of the United States Government;

* Representing or contending to any public officials in any form or forum that the Decree of Divorce rendered by the Court on May 28, 1980 in cause no. 77-1540 is null or void or invalid or is otherwise not a valid final judgment;

* Representing or contending to any public officials in any form that his marriage to Rachel was null or void or invalid or otherwise not lawfia or legal; and

* Representing or contending to any public officials in any form or forum that the Order Granting Partial Motion for Summary Judgment filed in Cause No. 87-5225 is a valid final judgment.

Richard contends that the injunction violates TEX.R.Civ.P. 683, and is constitutionally impermissible because it denies him liberty, free speech, and property without due process of law. He further complains that TEX.R.Civ.P. 329b is unconstitutional. Lastly, he argues that he was denied a jury trial.

Tex.R.Civ.P. 683

Pursuant to Tex.R.Civ.P. 683, an injunction shall set forth the reasons for the issuance, shall be specific in its terms, and shall describe in reasonable detail the acts enjoined.

specifically states that it is issued because: The injunction here states that it is issued because:

> RICHARD CHANDLER's action herein is groundless, frivolous, brought in bad faith, and brought for the sole purpose of harassment, that RICHARD CHANDLER has filed multiple actions in this and other courts seeking to invalidate and nullify this Court's Decree of Divorce of May 28, 1980, and this Court's Judgment of May 6, 1991, that all such actions are groundless, frivolous, brought in bad faith, and brought for the sole purpose of harassment, that all issues which RICHARD CHANDLER seeks to litigate in such actions have bcen previously resolved against RICHARD CHANDLER by the existing lawful Decree and Judgment of this Court, that such actions are barred by limitations and res judicata, that such actions address a threat to the jurisdiction of this Court, that the harm to Defendants constitutes irreparable harm, that the entry of a permanent injunction and a permanent Order'to Cease and Desist is necessitated to protect Defendants from vexatious and harassing litigation.

A prerequisite for injunctive relief is the threat of imminent harm. *Operation Rescue-National v.Planned Parenthood of houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 5 54 (Tex. 1998). The repetitious lawsuits brought over many years in many venues, all raising the same issues which had been resolved against him, demonstrate a proven track record of an abuse of the litigation process. The imminent harm to the

defendants was clear -- the ongoing expense of time and money to defend themselves in state and federal courts across the State of Texas.

Further, the terms of the injunction and the acts enjoined are specific. As we have detailed, making specific contentions to specific parties and/or entities. We find that the order complies with the requirements of Rule 683. *Schleuter v. City of Fort Worth,* 947 S.W.2d 920, 933 (Tex.App.Fort Worth 1997, writ denied).

Injunction Against Filing Further Suits on the Subject Matter

An anti-suit injunction is appropriate in four instances:

* to address a threat to the court's jurisdiction;

* to prevent the evasion of important public policy;

* to prevent a multiplicity of suits; or

*to protect a party from vexatious or harassing litigation.

Golden Rule Ins. Co. v. Harper, 925 S.W.2d 649, 651 (Tex. 1996); *Gannon v. Payne,* 706 S.W.2d 304, 307 (Tex. 1986). The party seeking the injunction must show that "a clear equity demands" the injunction. *Golden Rule Ins. Co.,* 925 S.W.2d at 651; *Christensen v. Integrity Ins. Co.,* 719 S.W.2d 161, 163

(Tex. 1986). Delay and expense of litigation are factors which may be considered in determining whether an injunction should issue. *In re Estate of Dilasky,* 972 S.W.2d 763, 767 (Tex.App.-Corpus Christi 1998, no pet.).

This case falls squarely within the third and fourth criteria. In each of the lawsuits filed by Richard, he has attempted to relitigate whether his marriage to Rachel was void and whether Rachel is entitled to an interest in his military retirement benefits. These issues have been resolved against him. His continuous barrage of law suits against his former wife and virtually every attorney that has come into contact with this case is vexatious and meant to harass. We find no abuse of discretion in enjoining these acts.

Free Speech

Richard next argues that his constitutional right to free speech is violated by enjoining him from presenting the partial summary judgment to any public official. He addresses his argument only to the Texas Constitution. Because he does not urge a violation of the First Amendment of the United States Constitution, we do not address it. We recognize, however, that

although two opinions[24] of the Texas Supreme Court have concluded that Article 1, Section 8 of the Texas Constitution affords broader protection of speech than the First Amendment, the Court has more recently determined that "[w]e know of nothing to suggest that injunctions restricting speech should be judged by a different standard under the state constitution than the First Amendment." *Operation Rescue-National,* 975 S.W.2d at 558.

Article 1, section 8 of the Texas Constitution states in pertinent part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.

This provision in our state Bill of Rights, like the First Amendment to the United States Constitution and similar provisions in the constitutions of other states, enshrines and protects a fundamental right long treasured by the people of this nation, the right of free speech. *Davenport v. Garcia,* 834

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24 *See Davenport v. Garcia,* 834 S.W.2d 4 (Tex. 1992) and *Ex parte Tucci,* 859 S.W.2d I (Tex. 1993).

S.W.2d 4, 30 (Tex. 1992). That right, however, is not absolute, as we long ago learned in our thinking about the First Amendment. Id. Justice Holmes' classic example, familiar to lawyers and non-lawyers alike, is that one does not have the right of "falsely shouting fire in a theatre and causing a panic." *Id. citing Schenck v. United States,* 249 U.S.47,52,39S.Ct. 247,249, 63 L.Ed. 470 (1919). Free speech can be abused, as Article 1, Section 8 expressly recognizes, and responsibility for that abuse is not only consistent with protecting the freedom, it is part of the freedom itself *Davenport,* 834 S.W.2d at 30. Freedom and responsibility have a symbiotic relationship; they are part of one another, yet operate in tension. *Davenport,* 834 S.W.2d at 30.

Directing us to *Ex parte Tucci,* 859 S.W.2d (Tex. 1993), Richard urges that restraints of free speech may be imposed only if the injunctive relief granted encompasses the least restrictive means of protecting against the harmful effect. The Supreme Court has since acknowledged that it misunderstood in *Tucci* the First Amendment test for injunction restrictions on speech. *Operation Rescue-National,* 975 S.W.2d at 558. Instead, the appropriate constitutional standard is that

an injunction must burden no more speech than necessary to serve a significant government interest. *Id.* at 560.

The trial court has enjoined Richard from representing to any public officials that the final decree of divorce is null, void, or invalid; that his marriage to Rachel was null, void, or invalid; or that the partial summary judgment in the bill of review is a valid final judgment. This was done to prevent Richard from attempting to strip Rachel of her vested property interest in his military retirement benefits. This limited burden on his speech is designed to ensure recognition and respect for our traditional concepts of *res judicata,* to protect targets of vexatious litigation from endless expense, and to protect the courts from an intrusion into already crowded dockets and strained resources. On the record before us, the injunction was reasonably tailored to the peculiar circumstances presented. *Operation Rescue-National,* 975 S.W.2d at 560 ("[A] trial court has some latitude in fashioning the details of appropriate relief"). We find no abuse of discretion in the trial court's determination that Richard should be enjoined from representing that Rachel is entitled to her vested property interest in the military retirement benefits.

Tex.R.Civ.P. 329b

Referencing TEX. CONST. art. 1, § 13 (open courts provisions) and the Fourteenth Amendment of the United States Constitution, Richard alleges that the manner in which Rule 329b was applied *in the bill overview action* was unconstitutional. We quote him here:

> Under **Baker** [25] Richard was required to plead and prove (1) a meritorious defense to the cause of action, (2) which he was prevented from asserting by the fraud, accident, or wrongful act of the opposing party, (3) unmixed with any fault or negligence of his own . . . . Although the marriage was void, Rule 329b(f) and **Baker** unconstitutionally required Richard to prove that he was prevented from presenting the defense of the void marriage in the divorce action because of Rachel's fraud.

Without regard to the merits of his contentions, we are unable to address them. Although Richard appealed the take-nothing judgment in the bill of review action, he did not challenge the constitutionality of those proceedings or the application of Rule 329b. Accordingly, he has waived his constitutional complaints.

Jury Trial

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25 *Baker v. Goldsmith*, 582 S.W.2d 404 (Tex. 1979).

Richard asserts that he received notice of the injunction hearing on February 28, 1997, for a trial setting of March 14, 1997. He alleges that he filed a jury demand on March 11, 1997[26] He contends that the trial court erred in denying his right to a jury trial since he had insufficient notice of the setting to timely file his request.

The Texas and United States Constitutions guarantee a jury trial. TEX.CONST. art. 1, *§ 15;* U.S.CONST.art.III, § 2. To be entitled to a jury trial, a party must follow the procedure set out in Tex.R.Civ.P. 216: not less than thirty days before

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26 The clerk's record is composed of an original volume and six supplements. Each contains a bill of costs. The bill of costs contained in volume one is dated November 8, 1995. While it duly reflects that a jury fee has been paid, this cannot be the fee that Richard references, which he claims was paid in March of 1997. Clearly, this jury fee relates to the jury trial in the bill of review action. The remaining volumes each contain a bill of costs, dated September 11, 1997, September 18, 1997, November 17, 1997, February 9, 1998, March 4, 1998, and March 31, 1998. None of these documents reflect the payment of a jury fee. While the record reflects that Richard's response to the motion for injunction and cease and desist order contained a statement that he had filed a jury demand and paid the fee, and although his designation of the transcript requests inclusion of the jury demand, it does not appear anywhere in the record. What is included is the portion of the docket sheet which indicates the response to the injunction request was filed on March II, 1997. There is no entry indicating that a jury demand was filed or that the jury fee was paid.

trial, the party must make a written request for a jury and pay a jury fee. *Huddle v. Huddle*, 696 S.W.2d 895, 895 (Tex. 1985); *Higginbotham v. Collateral Protection, Inc.*, 859 S.W.2d 487,489 (Tex.App.--Houston [1st Dist.] 1993, writ denied).

Our review of the record does not substantiate compliance with Rule 216; it fails to establish that a request was filed with the court or that the jury fee was paid. Richard testified at the March 14, 1997 hearing that he had requested a trial by jury, although it was admittedly not timely.[27] However, he did not apprise the court at the beginning of the hearing that he sought a jury trial. It was not until the conclusion of the hearing, after Rachel's attorney had rested, that Richard raised the issue. Had he brought it to the court's attention at the beginning of the hearing, and had he requested a continuance so that his jury demand would be timely filed, he would be entitled to relief. Having failed to do so, he has waived error. *Higginbotham*, 859 S.W.2d at 489. Thus, even if the record supported his contention that the jury demand was filed and the

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27 Richard did not testify that he had paid the jury fee.

fee paid, we would still be constrained to find waiver. Points of Error Seven, Eight, and Nine are overruled.

ATTORNEYS' FEES

T'he final order provided that Rachel and Weldon S. Copeland, Jr. recover attorneys' fees in the amount of $7,500 for presentation of the case in the trial court, $4,500 in the event of an appeal to the court of appeals, and $4,500 in the event of an appeal to the Supreme Court. Although not delineated in a separate point of error, Richard complains that a material fact issue exists regarding the award of attorneys' fees and that Rachel and her attorneys "have not submitted any summary judgment proof that would support the award of attorney fees." Rachel would have been entitled to seek attorneys' fees with regard to both Richard's suit to declare marriage void[28] and his motion to clarify.[29] Because Richard

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28 Former TEX.FAM.CODE ANN. § 3.65 (Vernon 1993)("in a suit for divorce or annulment or to declare a marriage void, the court may award costs to any party as it deems reasonable."). Attorney's fees may appropriately be assessed as costs. *Hirczy v. Hirczy*, 838 S.W.2d 783, 786 (Tex.App.--Corpus Christi 1992, writ denied); *McCallum v. McCallum*, 801 S.W.2d 579, 587 (Tex.App.--Corpus Christi 1990, writ denied). Title I of the Family Code was recodified by Acts 1997, 75th Leg., R.S., ch. 7, § 1, 1997 TEX.GEN.LAWS 8, eff. April 17, 1997. Specifically, former § 3.65 has been recodified and amended as § 6.708(a). Id. at 33. Because this proceeding was commenced prior to the recodification, we refer to the former statutory provisions.

also sought relief under the Uniform Declaratory Judgments Act, Rachel would have been entitled to seek attomeys' fees on that basis as well. Tex.Civ. Prac. & Rem.CODE ANN. § 37.009 (Vernon 1997). However, while her motion for summary judgment specifically sought the recovery of attorneys' fees, she failed to attach an affidavit of counsel as expert opinion testimony on the reasonableness of the fees. *Giao v. Smith & Lamm, P. C,* 714 S.W.2d 144, 148 (Tex.App.--Houston [1 st Dist.] 1986, no writ); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas,* 34 Hous.L.Rev. 5, 1377 (1998). Oral testimony is not to be received at the hearing. Tex.R.Civ.P. 166a(c); *Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d 266, 269 n.4 (Tex.1992). That being the case, the imposition of attorneys' fees in the summary judgment proceedings was inappropriate.

Remaining, then, is the propriety of the fee award on the basis of the injunction and cease and desist order. In his brief,

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[29] Former TEX.FAM.CODE ANN. § 3.77(Vemon 1993)("Reasonableattorney's fees may be taxed as costs in any proceeding under this subchapter. . . ."). Former § 3.77 has been recodified as § 9.014.

Richard complains that the testimony of Weldon S. Copeland, Jr. was self-serving, that as a sitting judge[30] he could not be awarded attorney's fees for representing Rachel, that Judge Marsh "rubber stamped" the amount of fees, and that for attorneys' fees to be recoverable, a party must actually recover damages. Without, regard to the merits of these arguments, we conclude Richard has waived error, if any, for failure to present the issue to the trial court.[31] Tex.R.App.P. 33. 1 (a). The only

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30 Weldon S. Copeland, Jr. withdrew as Rachel's attorney of record in 1989, left the practice of law, and became the judge of the County Court at Law of Collin County.

31 In his motion for new trial, Richard's only complaint addressing the fee award was as follows:

The court erred in awarding attorney's fees to defendant attorneys and other, not a party to this suit, because there is no basis for attorney fees in this case which arises from the divorce action Cause No. 77-1540, because such judgment if void, and if not void, did not award attorney's fees. Cause No. 87-5225 is a continuation of Cause No. 77-1540 and the partial summary judgment rendered in Cause No. 87-5225 on May 25, 1990, denied Rachel Chandler attorney's fees and the judgment rendered in Cause No. 87-5225 on May 6, 199 1, on a jury verdict, specifically denied Rachel Chandler any, attorney's fees.

We pause to note that Weldon S. Copeland, Jr. withdrew as the attorney of record for Rachel prior'to the entry of judgment in the bill of review proceedings. That judgment specifically denied Rachel any recovery for attorneys' fees. The proceedings in issue in this appeal were not commenced until 1994, some five years after Rachel substituted William Copeland as her attorney of record. However, Weldon S. Copeland, Jr. was a named defendant in this litigation, and sought and received summary judgment on those claims. He did not seek injunctive relief in his individual capacity, nor did Rachel request attorneys' fees in

remaining challenge to the fee award is, in effect, a complaint that the evidence is insufficient. Richard does not label it as such, address the appropriate standards of review, or brief the issue. His argument, in its entirety, is that:

> At page 42 of SOF3, Judge Copeland indicates that his testimony refers to No. 77- 540 and No. 87-5225 and the number of work hours involved was 30 hours at $150 an hour. Judges Copeland and Marsh compute a reasonable attorneys [sic] fee at $7,500. Richard multiplies 30 hours times $150 and computes $4,500. Likewise, attorney fees on appeal suffer from the same error; 25 hours at $150 is $3,750 not $4,500 and 30 hours at $150 is $4,500 not $7,500.

The fee testimony at trial, while not extensive, was a bit more detailed. Weldon S. Copeland, Jr. testified that with regard to Cause No. 77-1540, no less than thirty hours had been spent in trial preparation at an hourly rate of $150. He then determined that preparation of the case to the court of appeals would require no "less than 30 hours on the case, more like 50." He projected that fees for the appeal to the intermediate court

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connection with her request for injunctive relief. Richard has not complained of these discrepancies on appeal. A court of appeals may not reverse or reform a trial court's judgment except upon properly assigned error. *Pat Baker Co., Inc. v. Wilson,* 971 S.W.2d 447, 450 (Tex. 1998), *Allright, Inc. v. Pearsot; 735* S.W.2d 240, 240 (Tex. 1987).

would range between $4,500 [representing thirty hours at $150 per hour] and $7,500 [representing fifty hours at $150 per hour]. He anticipated a like amount would be required for presentation of the case to the Texas Supreme Court.

Copeland also testified to fees incurred in connection with Cause No. 87-5225, estimating that between thirty and fifty hours had been spent on that matter as well. Once again, he projected an appeal to the intermediate court would generate fees of $7,500 and fees of $4,500 in preparing the matter for the Supreme Court. Thus, the testimony as to representation in both causes reflects total hours of 60 to 100 at the rate of $150 per hour, presenting a range of fees for trial presentation between $9,000 and $15,000. This evidence more than supports the $7,500 award.

As for appeals to the intermediate court, Copeland's testimony provides a range between $12,000 [representing $4,500 for Cause No. 77-1540 and $7,500 for Cause No. 87-522] to $15,000 [representing $7,500 for each cause]. For presentation to the Supreme Court, the total range of testimony references $9,000 [representing $4,500 for Cause No. 77-1540 and $4,500 for Cause No. 87-52251 to $12,000 [representing

$7,500 for Cause No. 77-1540 and $4,500 for Cause No. 87-5225]. Certainly these two causes are irretrievably tangled and intertwined with the same or similar issues presented. The court accepted the high-end testimony for one cause as the reasonable fee for presentation at the trial court level, and the low-end testimony for one cause as the reasonable fee for presentation to the court of appeals and the Supreme Court. We conclude that the fee award is supported by sufficient evidence.

IMPROPER PARTY

Once again, although not designated as a point of error, Richard complains that the summary judgment is improper because there is a material fact issue precluding summary judgment for Weldon S. Copeland, Sr. In his brief, he states:

> Richard asserts that a material fact issue exists regarding Weldon S. Copeland being a party to this case. The docket in this cause only shows that Rachel, William and Weldon, Jr. have been served and shows that only they have answered. The existence of such material fact issue precludes summary judgment for Weldon S. Copeland.

While the motion for summary judgment filed by Rachel alleges that "RACHEL CHANDLER, WILLIAM COPELAND, WELDON S. COPELAND, AND WELDON S. COPELAND, JR., are entitled to judgment in their favor as a matter of law,"

the final judgment at bar does not grant summary judgment in favor of Weldon S. Copeland.[32] We find this argument to be without merit.

CONCLUSION

We recognize that divorce litigation is fraught with emotion, anger, hostility, and bitterness. The unraveling of the fabric we call "family" necessitates a period of grieving the death of the relationship. In her renowned book, ON DEATH AND DYING, Dr. Elisabeth Kubler-Ross recounts the five stages an individual endures in assimilating the death of a loved one: denial, anger, bargaining, depression, and finally, acceptance. Divorcing spouses encounter similar stages.[33] As with all

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32 We note that WeldonS. Copeland, Sr. was included among the parties protected by the cease and desist order. Because Richard has not challenged the cease and desist order on that basis, we do not address the issue.

33 In their book, SECOND CHANCES, Judith Wallerstein and Sandra Blakeslee recount three stages of divorce. The first or acute stage begins with escalating unhappiness and crests with the decision to divorce, setting the stage "for the spilling of anger and sexual impulses, depression and disorganization in die family." The second or transitional stage "is a time of alternating progress and regression, a time of trial and error and fluctuating moods." They describe the third stage as "marked by a renewed sense of stability." Judith Wallerstein & Sandra Blakeslee, SECOND CHANCES: MEN, WOMEN & CHILI)REN A DECADE AF-RER DIVORCE. WHO WINS, WHO LOSES, AND WHY, pp. 8-10 (1989).

modern tragedies, there comes a time when closure is necessary.

We find some similarity between the circumstances of this case and *Goad v. Goad,* 768 S.W.2d 356 (Tex.App.--Texarkana 1989, writ denied), *cert. denied,* 493 U.S. 1021, 110 S.Ct. 722, 107 L.Ed.2d 742 (1990). The dispute between the Goads involved Mrs. Goad's receipt upon divorce of an interest in Mr. Goad's military retirement benefits. The court of appeals ultimately sanctioned Mr. Goad, recognizing that "the fact that this is the sixth proceeding on this subject matter, not including the original decree that made the property division, convinces us that Roland Goad is intent upon continuing litigation against his ex-spouse despite judicial rulings." *Id.* at 3 60. When repetitious, vexatious, and harassing lawsuits are the chosen response to unsuccessful litigation, the courts must step in. For the Chandlers, closure comes only through injunctive relief.

We overrule all ten points of error and affirm the Judgment below.

April 15,1999

/s/AnnCrawfordMcClure, Justice

ANN CRAWFORD McCLURE, Justice

Before Panel No. 2
Barajas, C.J., McClure, and Chew, JJ.

(Publish)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

RICHARD L. CHANDLER,	)	No.08-97-00484-CV
	)	
	)	Appeal from
Appellant,	)	
	)	41st District Court
v.	)	
	)	of El Paso County, Texas
RACHEL CHANDLER,	)	
WILLIAM R. COPELAND,	)	(TC# 77-1540)
and WELDON S.	)	
COPELAND, JR.,	)	
	)	
Appellees.	)	

JUDGMENT

The Court has considered this cause on the record and concludes there was no error in the judgment. We therefore affirm the judgment of the court below. We further order that Appellees recover from Appellant's cash deposit in lieu of cost bond all costs, both in this Court and the court below, for which let execution issue, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 15TH DAY OF APRIL, 1999.

/s/ Ann C. McClure
Justice, Court of Appeals for the
Eighth District of Texas

Before Panel No. 2
Barajas, C.J., McClure, and Chew, JJ.

APPENDIX "B" PAGE 103

IN THE 41ST JUDICIAL DISTRICT COURT
EL PASO COUNTY, TEXAS

RICHARD CHANDLER

AND/VS Cause No. 77-1540

RACHEL CHANDLER, ET AL.

FINAL JUDGMENT
PERMANENT INJUNCTION, AND
PERMANENT ORDER TO CEASE AND DESIST

On March 14, 1997, came to be heard the above entitled and numbered cause. Plaintiff and Defendant's appeared in person.

The Court considered Defendant's Motion for Summary Judgment and finds that a Summary Judgment should be granted to Defendants.

The Summary Judgment evidence conclusively establishes that Plaintiff RICHARD CHANDLER'S asserted causes of action are barred by res judicata, and that all claims asserted by RICHARD CHANDLER werefully resolved against him in a final Decree of Divorce judgment rendered by this Court in Cause No. 77-1540, on May 28, 1980, and subsequently in a final judgment in a Bill of Review action rendered by this Court in Cause No. 87-5225, on May 6, 1991.

The Summary Judgment evidence conclusively establishes that Plaintiff RICHARD CHANDLER'S asserted causes of action accrued more than four years prior to the filing of this action, that the Bill of Review filed by RICHARD CHANDLER on June 5, 1987, alleged fraud, that RICHARD CHANDLER had notice or should have had notice of any cause of action based upon fraud not later than June 5, 1987, and that all actions filed by RICHARD CHANDLER after June 5, 1991, are barred by limitations.

The Summary Judgment evidence conclusively establishes that the document filed in Cause No. 87-5225 0n May 25, 1990, entitled "ORDER GRANTING PARTIAL MOTION FOR SUMMARYT JUDGMENT" WAS an interlocutory order which was invalidated and superseded by the final judgment thereafter rendered in such Cause, that such Order is null and void, that such Order is not a final judgment, that such Order is of no legal effect, and that RICHARD CHANDLER has wrongfully attempted to influance officials by representing that such Order is a valid, binding, operative Order of the Court.

The Court heard evidence on Defendant's Motion for Order to Cease and Desist and for Injunction.

The evidence establishes that RICHARD CHANDLER'S action herein is groundless, frivolous, brought in bad faith, and brought for the sole purpose of harassment, that RICHARD CHANDLER has filed mulitple actions in this and other courts seeking to invalidate and nullify this Court's Decree of Divorce of May 28, 1980, and this Court's Judgment of May 6, 1991, that all such actions are groundless, frivolous, brought in bad faith, and brought for the sole purpose of harassment, that all issues which RICHARD CHANDLER seeks to litigate in such actions have been previously resolved against RICHARD CHANDLER by the existing lawful Decree and Judgment of this Court, that such actions are barred by limitations and res judicata, that such actions address a threat to the jurisdiction of this Court, that the harm to Defendants constitutes irreparable harm, that the entry of a permanent injunction and a permanent injunction and a permanent Order to Cease and Desist is necessitated to protect Defendants from vexatious and harassing litigation. The Court accordingly enters

this PERMANENT INJUNCTION and this PERMANENT ORDER TO CEASE AND DESIST.

RICHARD CHANDLER is PERMANENTLY ENJO1NED from and he is PERMANENTLY ORDERED TO CEASE AND DESIST in filing any new actions against or proceeding with any actions now pending against RACHEL CHANDLER, WILLIAM COPELAND, WELDON S. COPELAND, SR., WELDON S. COPELAND, JR., WALTER BOYAKI, JOHN MUNDIE, RALPH MIRANDA, and THE UNITED STATES OF AMERICA, INCLUD1NG THE UNITED STATES ARMY, THE UNITED STATES TREASURY, and all other AGENCIES, BRANCHES, OR COMPONENT PARTS OF THE UNITED STATES GOVERNMENT

RICHARD CHANDLER is further and additionally permanently enjoined from and he is permanently Ordered to cease and desist from repressenting or contending to any public officials in any form or forum that the Decree of Divorce rendered by this Court on May 28, 1980, in Cause No. 77-1540 in null or void or invalid or otherwise not a valid final judgment.

RICHARD CHANDLER is further and additionally permanently enjoined from and he is permanently Ordered to cease and desist from representing or contending to any public officials in any form that his marriage to RACHEL CHADLER was null or void or invalid or otherwise not lawful or legal.

RICHARD CHANDLER is further and additionally permanently enjoined from and he is permanently Ordered to cease and desist from representing or contending to any public officials in any form or forum that the document filed in Cause No. 87-5225 on May 25, 1990, entitled "ORDER GRANTING PARTIAL MOTION FOR SUMMARY JUDGMENT" is a valid final judgment.

RACHEL CHAND'LER and WELDON S. COPELAND, JR., are awarded judgment against RICHARD CHANDLER for attorneys fees in the sum of $7,500.00 for the trial of this action, and in the additional sum of $4,500.00 in the event of an appeal of this action to the Court of Appeals, and in the further additional sum of $4,500.00 in the event of an appeal of this action to the Supreme Court of Texas, togethaer with interest thereon from this date at the rate ten percent per

annum. All costs of this suit are assessed against RICHARD CHANDLER.

Signed May 12, 1997.

/s/ Rendered in open court 3-14-97 "initials" hm

/s/ HM (41st)
Judge Presiding

APPENDIX "C" PAGE 6

COURT OF APPEALS
EIGHTh DISTRICT OF TEXAS
EL PASO, TEXAS

RICHARD L. CHANDLER, Appellant, v. RACHEL CHANDLER, WILLIAM R. COPELAND, and WELDON S. COPELAND, JR., Appellees.	)	No. 08-97-00484-CV Appeal from 41st District Court of El Paso County, Texas (TC# 77-1540)

ORDER

The Appellant's motion to recuse, having been duly considered, and being of the opinion that the same should be denied as untimely; It is ORDERED that said motion be and it is hereby denied.

IT IS SO ORDERED THIS 9TH DAY OF JUNE, 1999.

/s/ Ann Crawford Mc.Clure
ANN CRAWFORD McCLURE, Justice

Before Panel No. 2
Barajas, C.J., McClure, and Chew, JJ.

APPENDIX "D" PAGE 1

COURT OF APPEALS
EIGHTh DISTRICT OF TEXAS
EL PASO, TEXAS

RICHARD L. CHANDLER,	)	No. 08-97-00484-CV
	)	
Appellant,	)	Appeal from
	)	
v.	)	41st District Court
RACHEL CHANDLER,	)	
WILLIAM R. COPELAND,	)	of El Paso County, Texas
and WELDON S.	)	
COPELAND, JR.,	)	(TC# 77-1540)
Appellees.	)	

ORDER

The Appellant's motion for rehearing, having been duly considered, and being of the opinion that the same should be overruled; It is ORDERED that said motion be and it is hereby overruled.

IT IS SO ORDERED THIS 9TH DAY OF JUNE, 1999.

/s/ Ann Crawford Mc.Clure
ANN CRAWFORD McCLURE, Justice

En Banc
Barajas, C.J., Larsen, McClure, and Chew, JJ.

APPENDIX "E" PAGE 2

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTE PROVISIONS

Uniformed Services Former Spouses' Protection Act
USFSPA

10 U.S.C.A. § 1408(a)(2)

"Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which-

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for- (1) payment of child upport (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defiiied in section 462(c) of (the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) specifically provides for the payment of an amount) expressed in dollars or as a percentage of disposable retired or

retainer pay, from the disposable retired or retainer pay of a member to, the spouse or former spouse of that member.

10 U.S.C.A. § 1408(a)(4)

The term "disposable retired pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which -

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of

such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom paymept of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

10 U.S.C.A. § 1408(d)(1)

After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In

the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

10 U.S.C.A. § 1408(e)(1)

The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

TEXAS RULES OF APPELLATE PROCEDURE

Rule 16

Disqualification or Recusal of Appellate Judges

16. 1. Grounds for Disqualification

The grounds for disqualification of an appellate court justice or judge are determined by the Constitution and laws of Texas.

16.2. Grounds for Recusal

The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure. In addition, a justice or judge must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending.-

16.3. Procedure for Recusal

(a) *Motion.* A party may file a motion to recuse a justice of judge before whom the case is pending. The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case.

(b) *Decision.* Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

(c) *Appeal.* An order of recusal is not reviewable, but the denial of a recusal motion is reviewable.